Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, ET AL.,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

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JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

The State Board of Pharmacy of the Commonwealth of Virginia and the members thereof appeal from the order of the three-judge District Court below declaring § 54-524.35(3) of the Code of Virginia (1950), as amended, violative of the First Amendment to the Constitution of the United States insofar as it prohibits the publishing, advertising, or promoting of any price, fee, premium, discount, rebate or credit terms for prescription drugs, and the order of the three-judge District Court denying Appellants mo-

tion to amend findings or judgment or in the alternative for a new trial, entered herein on October 4, 1974.

OPINION OF THE COURT BELOW

The order of the three-judge District Court denying the motion of the Appellants to amend findings or judgment, or, in the alternative, for a new trial, is not reported and is set forth in the Appendix, *infra,* at 1a. The opinion of the three-judge District Court is reported at 373 F. Supp. 683 and is set forth in the Appendix, *infra,* at 2a.

JURISDICTION

The order of the Three-judge District Court denying the motion of Appellants to amend findings or judgment, or, in the alternative, for a new trial was entered on October 4, 1974,[1] and a notice of appeal was filed in that court on November 4, 1974. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1253.

STATUTE INVOLVED

"When pharmacist considered guilty of unprofessional conduct.—Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription." Va. Code Ann. §54-524.35.

[1] Appellees, relying on *F.T.C.* v. *Minneapolis-Honeywell R. Co.,* 344 U.S. 206 (1952) will assert that the October 4, 1974 Order merely reiterated the court's original decision and thus this appeal is untimely. This ignores the fact that the original decision of March 21, 1974, was never final since a motion was timely filed, on April 1, 1974, pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure. Any complaint that a brief in support of such motion was not properly filed in accord with the local rules of the United States District Court for the Eastern District of Virginia must be and in fact was addressed to that Court. The lower court ignored appellee's argument.

QUESTION PRESENTED

Does the First Amendment grant consumers an independent "right-to-know" thus allowing invalidation of a statute which validly prohibits the desemination of commercial advertising. Phrased another way, the question is, does the First Amendment grant a right to be commercially advertized to, when there is no correlative right to commercially advertize.

STATEMENT OF THE CASE

On July 1, 1973, the Appellees, Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO, and Lynn B. Jordan, instituted in the United States District Court for the Eastern District of Virginia this class action against the Appellants, the Virginia State Board of Pharmacy and each of the members thereof. The Appellees sought an injunction against the enforcement by the Appellants of Va. Code Ann. § 54-524.35(3) which declares the publishing, advertising, or promotion of prices, fees discounts, rebates or credit terms for prescription drugs to be unprofessional conduct subjecting offending pharmacists to possible disciplinary sanctions. While recognizing that the State may pro-

hibit the advertising of prescription drug prices by pharmacists, *Patterson Drug Co.* v. *Kingery,* 305 F. Supp. 821 (W.D. Va. 1969) (three-judge court) (App., *infra,* at 6a), the District Court enjoined the enforcement of the statute as violative of the consumers' "right-to-know."

Section 54-524.35 (3) in no way subjects the Appellee or any persons they purport to represent to the jurisdiction of the Appellants. It does subject pharmacists, licensed by the State Board of Pharmacy, to disciplinary action, although no such action has been taken. In addition, it has never been claimed, nor have the Appellants indicated in any way, that price information may not be disseminated or otherwise be made available to the public by other methods such as in response to telephonic or oral requests.

While statistics reflect a disparity in the price of prescription drugs between individual pharmacies and, indeed, between different pharmacies in the same chain of pharmacies, there is no evidence in the record that the inability to advertise prescription drug prices results in higher prices to the consumer. It was stipulated in the court below that there is at least as great a disparity in the prices of non-prescription drugs which are freely advertised and promoted.

It was also stipulated that pharmacy is a profession which requires its practitioners to have five years of university level training, one year's practical training and the successful completion of an examination prior to licensure. Va. Code Ann. §§ 54-524.2(a) and 54-524.21.

THE QUESTION IS SUBSTANTIAL

For a number of reasons, the question decided by the court below is of such a substantial nature as to require plenary consideration by this Court, with briefs on the merits and

oral argument. Initially in this connection, the decision of the court below, is inconsistent with the decisions of this Court in *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935) and *Williamson* v. *Lee Optical,* 348 U.S. 483 (1955). It is also in diametric opposition to the decision of the three-judge District Court for the Western District of Virginia in *Patterson Drug Co.* v. *Kingery,* 305 F. Supp. (W.D. Va. 1969), which upheld, against First and Fourteenth Amendment attack, identical statutory provision attacked in the court below and to which the court below expressly refused to ascribe any infirmity. (App., *infra,* at 6a.) In addition, the decision of the court below enunciated an entirely novel principle of constitutional law, which is not only without decisional support, but is also squarely in contravention of the controlling principles approved by this Court in *Valentine, Semler* and *Williamson.*

The Commonwealth of Virginia has found "The practice of pharmacy . . . [to be] a professional practice affecting the public health, safety and welfare and . . . subject to regulation and control in public interest," Va. Code Ann, § 54-524.2(a), and it was so stipulated by the parties. (App. *infra,* p. 4a.) The statutory provision under scrutiny merely prohibits individuals who undertake the profession from advertising the prices they charge for prescription drugs. Such advertisements, of course, do no more than propose a commercial transaction—the sale of drugs. Because it is a classic example of commercial speech, *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385 (1973), price advertising is unprotected by the First Amendment. *Valentine* v. *Chrestensen, supra.* In striking down the advertising proscription of § 54-524.35(3), the district court's opinion is at war with the principle en-

nunciated by this Court in *Valentine* that the First Amendment does not protect purely commercial advertising.

Because we are dealing here with pure commercial speech unprotected by the First Amendment, the question becomes whether the advertising proscription bears some rational relationship to a legitimate state end. *McDonald* v. *Board of Election Com'rs.*, 394 U.S. 802 (1969). Clearly, the authority to act in the interest of public health, which is at the very core of the police power of a state, supports the statute in question. The decision of the court below, however, eschews this authority.

First in *Semler* and again in *Williamson* this Court upheld statutes prohibiting advertising in the health field as a valid exercise of the state's authority to protect the public health, safety and welfare. While recognizing the continuing validity of those decisions, the court below erroneously held that the statutes involved in those decisions differed from that under scrutiny here:

> "We do not find adversely dispositive of the issue here Head v. New Mexico Board of Examiners, 374 US 424 (1963), Semler v. Oregon State Board of Dental Examiners, 294 US 608 (1935) or Williamson v. Lee Optical Co., 348 US 483 (1955). State statutes there approved condemned generally advertisements of the door-to-door sale of eyeglasses with guarantees of satisfaction; advertisements of professional superiority of certain dentists and the carrying of their fees; and advertisements "soliciting" the sale of eyeglasses and frames by "baiting" and "enticing" the public into buying them.
>
> Clearly these publications were ex facie suppressible under State police powers and the interdicting statutes unquestionable. Just as clearly, however, the Virginia statute in suit is not of this ilk. It excludes an advertisement of a named drug which has been written into an authentic prescription issued to a patient individually by his doctor to be filled only by a licensed pharmacist. The laws sustained in *Head, Semler* and *Williamson* surely did not encompass prescription holders like the claimants in this suit."

The district court's failure to apply the principles of *Semler* and *Williamson* was improper, however. The statute under attack in *Semler* prohibited *inter alia* the advertising of prices for professional services 294 U.S. at 609. In *Williamson* the statute made it unlawful "to solicit the sale of frames, mountings . . . or any other optical appliances." 348 U.S. at 489. The statute in question here prohibits advertisements of prescription drug prices. Clearly, there is no legally significant difference between the statutes upheld in *Semler* and *Williamson* and the statute here.

Furthermore, the district court's attempt to distinguish *Semler* and *Williamson* on the grounds that this statute deals with prescription drugs filled by licensed pharmacists is utterly without merit. In *Semler,* the statute was directed against licensed dentists. In *Williamson* the statute was directed against licensed opticians who had to follow the prescriptions of ophthalmologists or optometrists; a situation identical to that of pharmacists dispensing prescription drugs. In short, there is no difference between the *Semler* and *Williamson* cases and this case other than the crucial fact that the district court here refused to follow those cases.

There is a substantial relationship between the challenged statute and the protection of the public health, safety and welfare.[2] As stated by the court in *Patterson,* 305 F. Supp. at 824-25:

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[2] Appellants introduced into evidence exhibits and testimony of pharmacists, doctors and leading scholars in pharmacology demonstrating 1) the important role a pharmacist has in the medical health field and 2) how such role safeguards the public taking antagonistic drugs,

"Pharmacists must have extensive knowledge of a wide range of drugs. Accuracy is essential; mistakes can be serious. A few prescriptions, but nevertheless a significant number, cannot be filled from drugs available in manufactured form, so the medicine must be compounded by the pharmacists. Some pharmacists, probably a minority, systematically monitor prescriptions by family records to avoid allergic reactions or the simultaneous use of antagonistic drugs, of which the patient's doctor may not be aware. Although monitoring is not completely effective because of the mobility of customers and the availability of nonprescription drugs which may be antagonistic, it is a benefit to the public.

"From the evidence we find that dispensing prescription drugs affects the public health, safety and welfare. And we conclude that the state's classification and regulation of pharmacy as a professional practice is not arbitrary or invidious."

It cannot seriously be maintained that the statute does not bear a rational relationship to a legitimate State end. Indeed, to find otherwise would require a reversal of *Williamson* and *Semler*.

The opinion of the court below is also in irreconcilable conflict with the decision of the three-judge district court in *Patterson*. In *Patterson* the court had before it the identical advertising proscription. As here, the statute was being subjected to First Amendment attack. Unlike the court

especially with the utilization of patient profile records. Family prescription or patient profile records generally are kept alphabetically by family name. The record reflects the drugs being taken by each member of the family unit. Also included are known sensitivities to drugs, and any other information that might affect the health of the individual by consuming drugs. With this information in one place the pharmacist, at a glance, is able to evaluate whether a particular drug should be given without further inquiry of the physician or the patient. Obviously, the system breaks down and becomes useless when the patient uses many different pharmacies.

here, however, the court in *Patterson* correctly found no violation of First Amendment rights and upheld the enforceability of the statute.

The court below expressly refused to reject the holding in *Patterson*:

> "Validity of the Virginia law, say the defendants, is secured in the able opinion of *Patterson Drug Company* v. *Kingery,* 306 F. Supp 821 (3-judge court, W.D. Va. 1969). No infirmity is now ascribed to that decision, but notably there the suit was cast in a context quite the opposite of that pleaded here. In *Kingery,* the unsuccessful assailants were pharmacists, sellers of the drugs and, of course, theirs was a prima facie commercial approach. The opinion mentions the First Amendment only to note its inapplicability because the case involved commercial advertising. Consumers' consequences, though, understandably were not discussed since they were not raised." 373 F. Supp. at 685-686.

The lower court's attempted distinction of the *Patterson* case, however, is without merit. First, the advertising proscription under attack in *Patterson* was identical to that under attack in this case. The *Patterson* court upheld the proscription against First and Fourteenth Amendment attack, a holding with which the court below was in agreement. The court below attempted to distinguish the cases on the basis that *Patterson* was brought by pharmacists while the instant litigation was instituted by consumers. This is, indeed, a distinction without a difference. If the proscription did not violate First Amendment rights in *Patterson,* it cannot do so now. If the proscription was a lawful exercise of the State's police power in *Patterson,* it can be no less here.

Second, the court below stated that the *Patterson* court did not discuss the plight of consumers. This is erroneous.

The *Patterson* court correctly recognized that it was not sitting as a superlegislature. As stated by that court:

> "We have not overlooked the anticompetitive effect of the ban on advertising.
>
> However, we are not empowered to determine whether the statute is wise or foolish, economically sound or improvident. Decision of these issues lies with the state legislature. Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963)." *Patterson, supra,* at 825-26.

The court below erred in arrogating unto itself the powers of the Virginia General Assembly. It is clear that the court considered the advertising proscription economically unsound and substituted its wisdom for that of the Virginia legislature. The decision of the court below is a throwback to the days in which courts "exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise." *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 414 U.S. 156, 164 (1973). The decision of the court below is "a derelict in the stream of the law," *Id.* at 167, clearly deserving reversal.

No decision of this Court has ever gone so far. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), *Martin* v. *Struthers,* 319 U.S. 141 (1942) have emphasized the correlative right to receive information where there was a protected right to speak or distribute. This is but common sense. It would certainly stymie an individual's ability to communicate if the state could interfere with the receipt of such information.

The instant decision, however, holds that notwithstanding a state's legitimate interest in controlling advertising of services by professions, a consumer has a First Amendment "right-to-know" which abrogates such control. Such a holding means a possible invalidation of those statutes which pro-

hibit advertising by doctors, lawyers and all others in professional fields.[3]

The validity of state statutes cannot be dependent upon who sues. In Virginia, the very statute involved herein was declared valid when pharmacists brought suit, *Patterson* v. *Kingery, supra,* and then was declared invalid when consumers brought suit. This is, as indicated, an anomaly in the law, which cannot stand.

What appellees and the lower court are doing, is merely substituting for the Fourteenth Amendment, a First Amendment "right to know." Once the substitution is completed the courts will once again be deciding which legislation is wise. The wisdom of legislation is not a field for the judiciary. It was rejected by this court over 40 years ago and should not be allowed to once again breath new life.

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[3] The right to know is already being used as the basis for challenging a Maryland statute which prohibits doctors from advertising. *Public Citizens Health Research Group, et al.* v. *Commission on Medical Discipline of Maryland,* Civil Action No. B74-56 U.S.D.C. for the District of Maryland.

CONCLUSION

For the reasons stated probable juris should be noted.

Respectfully submitted,

VIRGINIA STATE BOARD OF PHARMACY, *et al.*

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Anthony F. Troy, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Virginia State Board of Pharmacy in the above-captioned matter, hereby certify that three (3) copies of this Jurisdictional Statement have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 20th day of January, 1975, as follows:

James W. Benton, Jr., Esquire
Hill, Tucker and Marsh
214 East Clay Street
Richmond, Virginia 23219

Raymond T. Bonner, Esquire
Allan B. Morrison, Esquire
Suite 515
2000 P Street N.W.
Washington, D.C. 20036

Attorneys for Appellees

All persons required to be served have been served.

ANTHONY F. TROY
Deputy Attorney General

APPENDIX

ORDER

Filed October 4, 1974

Deeming it proper so to do, it is ADJUDGED and ORDERED that the defendants' motion to amend findings or judgment, or, in the alternative, for a new trial, be, and the same is hereby, denied.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Albert V. Bryan
United States Circuit Judge

/s/ John A. MacKenzie
United States District Judge

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: Oct 4 1974

FINAL ORDER OF DECLARATORY JUDGMENT AND INJUNCTION

Filed March 21, 1974

For the reasons stated in the written opinion of the court this day filed, it is ADJUDGED, ORDERED and DECREED as follows:

1. That so much of the statute of Virginia, cited as 1950 Code of Virginia, as amended (1972 Supp.) § 54.524.35(3), as prohibits the publishing, advertising or promoting, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for any drugs which may be dispensed only by prescription, is hereby declared to be void and of no effect; and

2. That the defendants in this action, and each of them, their officers, agents, servants, employees and attorneys, as well as their successors in office, be and they are hereby forthwith restrained and enjoined from enforcing the said statute insofar as it has hereinbefore been declared void and of no effect.

The Clerk is directed to send a copy of the said opinion and of this order to counsel of record in this case, and to tax the costs of this action against the defendants, the court awarding costs to the plaintiffs.
March 21, 1974.

/s/ Albert V. Bryan
United States Circuit Judge

/s/ John A. MacKenzie
United States District Judge

/s/ Robert R. Merhige, Jr.
United States District Judge

* * *

OPINION OF THE COURT

Filed March 21, 1974

Albert V. Bryan, Senior Circuit Judge:

A Virginia law[1] is here decried as unconstitutional[2], as well as violative of Federal law[3], in imputing "unprofessional conduct" to any pharmacist who "publishes, advertises or promotes" in any manner "the price, fee . . . discount, rebate or credit terms . . . for drugs which may be disposed of only by prescription". The State Board of Pharmacy may rescind the license of any pharmacist engaging in the forbidden activity. The result is that no such price dissemination prevails in Virginia. Declaration of its invalidity and injunction of its enforcement are requested of us[4]; we accede.

[1] 1950 Code of Va., as amended (1972 Supp.), § 54.524.35(3).
[2] First and Fourteenth Amendments.
[3] 42 USC 1983, providing right of action for deprivation of civil rights.

At once it must be emphasized that the plaint here is that of *consumers,* not the pharmacists. Again, this suit does not involve the illegitimate use of drugs, or even the free use of legitimate drugs, or the illegal procurement or disposal of them. Only professionally prescribed drugs compounded by professional pharmacists are the subject of this litigation, and then only their prices, entirely devoid of comment or advice as to their healing capabilities.

Plaintiffs comprise a resident of the State, suffering from a disease requiring her to take prescription drugs frequently, and unincorporated associations representing their respective groups who, in many instances, are dependent on prescription drugs. As to their standing to sue see, *Flast* v. *Cohen,* 392 US 83, 101 (1968); *NAACP* v. *Button,* 371 US 415, 428 (1963). Defendants are the Board of Pharmacy, with its individual members, which is responsible for the enforcement of the Virginia law regulating the practice of pharmacy in Virginia.

Plaintiffs complain that the State law precludes them from information as to where prescription drugs may be bought at the least expense, and there are costly disparities in the amounts charged therefor, but that without knowledge of these differences they cannot take advantage of the lower costs commensurate with their means. They further assert that the ages and physical infirmities of many of the individual plaintiffs prevent their ascertaining the most economical purchase; that a material part of elderly persons'

[4] 28 USC 2281—requiring 3-judge court for such an injunction.

income is laid out on medicine; that at many times the medicine prescribed is vital to their well-being; and that their finances may control where they can procure desperately needed drugs. Consequently, plaintiffs earnestly contend that the enactment is a substantial infringement of their privileges under the First Amendment in withdrawing from them necessibility to the benefits of price publications.

The facts just advanced—but not the legal conclusions—are not disputed. It is stipulated, too, that pharmacy is a profession, its licensing and practice demanding thorough collegiate academic application of several years in preparation for entrance into the professional study, with graduation from an accredited school of pharmacy. Expenditures annually for prescription drugs are vast, running into the billions of dollars. Prices therefor do in truth vary tremendously throughout the State. In substantiation the parties have stipulated:

> "22. (a) In Northern Virginia the price of 25 Darvon capsules (standard dosage) ranges from $2.35 to $3.65, a difference of 55%; the price of 40 Achromycin tablets (standard dosage) from $2.50 to $4.70, a difference of 90%; of 40 Tetracycline tablets (standard dosage) from $1.68 to $3.90, a difference of 132%.
>
> (b) In Richmond, the cost of 40 Achromycin tablets ranges from $2.50 to $6.00, a difference of 140%.
>
> (c) In the Newport News-Hampton, Virginia peninsula area the following variations exist:
>
> (1) Tetracycline: $1.20 to $9.00, a 650% difference;
>
> (2) Achromycin: $2.20 to $7.80, a 241% difference;
>
> (3) Darvon: $1.90 to $4.70, a 147% difference."

Danger to the public would not be threatened by the advertisement of prescription drugs, the plaintiffs accent, because every sale must be accompanied by a prescription from a licensed physician. The medication would still be the result of the doctor's diagnosis of the patient. Furthermore, the drug would be the product of a rigidly licensed pharmacist. Consequently, the advertisement, it is further pressed. does not encourage the use of drugs, for they would not thereby become more readily obtainable through price publication. Thus, it is avouched that price advertisement does not either potentially or actually affect the health of the user.

The Argument

Initially, Fourteenth Amendment due process protection was invoked by the plaintiffs on behalf of the consumer. This position is no longer pressed. In a written statement filed with the court at argument, the plaintiffs say they "have concluded that they should not pursue in this Court their position that the Virginia law which prohibits advertising of prescription drug price information violates the Fourteenth Amendment", citing as their reason North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., US , 42 Ill 4035 (December 5, 1973)[5].

However, a First Amendment safeguard, constrictive of the State through the Fourteenth, DeJonge v. Oregon, 899 US 353, 364 (1937), is interposed:

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[5] "We [plaintiffs] do, however, wish to reserve such argument in order to urge before the Supreme Court (should this case be appealed) that the *North Dakota State Board of Pharmacy* case exempts only purely economic legislation from the scrutiny of the Fourteenth Amendment, and that the legislation at issue here, which significantly affects the health of the public must satisfy the real and substantial relation test." See, *Statement of Plaintiffs' Position,* (December 11, 1973).

> "[A State] shall make no law . . . abridging the freedom of speech, or of the press . . ."

to forestall Virginia's instant stricture. Here the plaintiffs reiterate the circumstances of the sick and needy patients who seek the price information to ease their suffering and perhaps aid their survival. Plaintiffs urge that the First Amendment assures its freedoms to the auditor and reader as stoutly as it does the speaker and writer. Kleindienst v. Mandel, 408 US 753, 762-764 (1972; Stanley v. Georgia, 394 US 557, 564 (1969).

In rebuttal, defendants contend that the First Amendment does not shield commercial speech or writing, and that advertisement of prescription drug prices is a commercial publication, citing Valentine v. Chrestensen, 316 US 52, 54 (1942). However, rejoin the consumers, the predominant factor here is that the barring of publication could retard access to a means of medical relief for the invalid and thus affront the First Amendment.

The Point for Decision

The controversy here comes, therefore, to whether the State may legally exclude from publication prescription drug prices *not otherwise fairly available* to those consumers who vitally need the drugs, but who, because of disability, illness or poverty, can only afford the very lowest price.

The Authorities

Validity of the Virginia law, say the defendants, is secured in the able opinion of Patterson Drug Company v. Kingery, 306 FS 821 (3-judge court, WDVa. 1969). No infirmity is now ascribed to that decision, but notably there the suit was cast in a context quite the opposite of that

pleaded here. In *Kingery,* the unsuccessful assailants were pharmacists, sellers of the drugs and, of course, theirs was a prima facie commercial approach. The opinion mentions the First Amendment only to note its inapplicability because the case involved commercial advertising. Consumers' consequences, though, understandably were not discussed since they were not raised.

Instantly, the actual suitors are consumers; their concern is fundamentally deeper than a trade consideration. While it touches commerce closely, the overriding worry is the hindrance to a means for preserving health or even saving life. Speaking of Valentine v. Chrestensen, supra, 316 US 52, the opinion in Pittsburgh Press Co. v. Human Relations Commission, 413 US 376, 384 (June 21, 1973) somewhat tempers the former's downright exclusion: "Subsequent cases have demonstrated, however, that speech is not rendered commercial by the mere fact that it relates to an advertisement". It adds that implicitly constitutional protection could be accorded where First Amendment interest "might arguably outweigh the governmental interest supporting" a prohibition. P. 389.

Additionally, this cause has no design to curtail the State's discipline of pharmacies—the statute's evident aim. It was drawn with the pharmacy in mind, certainly not the needy consumer. Consideration by the courts of the consumers' necessities is thus not an intrusion upon the State's regulation of pharmacies, frowned upon in North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra, But even there the Court excepted those occasions where the State law would "run afoul" of constitutional prohibitions, of course including the First Amendment.

Florida, Maryland and Pennsylvania have fully removed the bars to the publication of prescription drug prices.

Florida Board of Pharmacy v. Webb's City, Inc., ... Fla. ....., 219 S.2d 681 (1969); Maryland Board of Pharmacy v. Sav-A-Lot, Inc., ... Md. ....., ... A.2d ..... (1973) and Pennsylvania State Board of Pharmacy v. Pastor, 441 Pa. 186, ... A.2d ..... (1971)[6]. The most trenchant relevancy and force of these precedents are their due acknowledgment and just accordance of the necessity of price information. These holdings are pro bono publico enunciations but nonetheless persuasive, though without constitutional footing.

We do not find adversely dispositive of the issue here Head v. New Mexico Board of Examiners, 374 US 424 (1963), Semler v. Oregon State Board of Dental Examiners, 294 US 608 (1935) or Williamson v. Lee Optical Co., 348 US 483 (1955). State statutes there approved condemned generally advertisements of the door-to-door sale of eyeglasses with guarantees of satisfaction; advertisements of professional superiority of certain dentists and the carrying of their fees; and advertisements "soliciting" the sale of eyeglasses and frames by "baiting" and "enticing" the public into buying them.

Clearly these publications were ex facie suppressible under State police powers and the interdicting statutes unquestionable. Just as clearly, however, the Virginia statute in suit is not of this ilk. It excludes an advertisement of a named drug which has been written into an authentic prescription issued to a patient individually by his doctor to be filled only by a licensed pharmacist. The laws sustained in *Head*, *Semler* and *Williamson* surely did not encompass prescription holders like the claimants in this suit.

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[6] While the opinions in *Sav-A-Lot* and *Pastor* observe passim that the Federal courts no longer disapprove State economic legislation on substantive due process grounds, nothing is said in disparagement of the Federal courts' duty to preclude abrogations of Constitutional equal protection or freedom of press guarantees.

Conclusion

The right-to-know is the foundation of the First Amendment; it is the theme of this suit. Consumers are denied this right by the Virginia statute. It is on this premise that we grant the plaintiffs the injunction and the declaration they ask.

Why the customer is refused this knowledge is not convincingly explained by the State Board of Pharmacy and its members. Enforcement of the ban gives no succor to public health; on the contrary, access by the infirm or poor to the price of prescription drugs would be for their good. This information "serves as a tool to educate rather than deceive". Maryland Board of Pharmacy v. Sav-A-Lot, Inc., supra (slip opinion, p. 11).

The belief that price advertising will inflate the market for the drugs is wholly untenable, since the medicine is controlled by prescriptions of physicians and so the sale of the drugs is not even at the druggists' will.

An order of injunction and a declaratory judgment will be entered as prayed in the complaint, with costs to the plaintiffs.

APPENDIX

In The

Supreme Court of the United States

October Term, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, ET AL.,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER
COUNCIL, INC., ET AL.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

FILED JANUARY 20, 1975

PROBABLE JURISDICTION NOTED MARCH 17, 1975

(1) Opinion and order of the Court entered on March 21, 1974, is reported at 373 F. Supp. 683, and is also reproduced in the Appendix to the Jurisdictional Statement, App. 1-9.

(2) The Motion to Amend Findings or Judgment or in the Alternative for a New Trial and the Memorandum in Support is reproduced in the Appendix to Appellees' Motion to Dismiss, A. 2-A. 10.

DOCKET ENTRIES

1973

July 11—Complaint filed and summonses issued to defts.

July 11—Pltfs' Preliminary Interrogatories, filed.

July 13—Marshal's return on summons executed as to all defts., except Thomas F. Marshall, Jr., filed.

July 16—Notification and Request of Court for Designation of Three-Judge Court ent 7-16-73 & filed. Copies mailed as directed.

July 20—Order designating Judge Albert V. Bryan, Sr., United States Circuit Judge and John A. MacKenzie, United States District Judge, to sit with Robert R. Merhige, Jr., in the hearing and determination of this case, ent. 7-18-73. Copy mailed James Banton. (copies of pleadings mailed Judges)

July 31—Motion to dismiss filed by defts. (copies mailed Judges)

Aug. 24—Order soliciting response to motion to dismiss, entered, filed. Copies mailed as directed.

Aug. 27—Defts' Memorandum in Support of Motion to Dismiss filed. Copies mailed judges.

Sept. 7—Plfts' Opposition to defts' motion to dismiss filed.

Sept. 20—Pre-Trial Order directing: 1. answers in 14 days; pltf. replies 10 days after receipt of answers; stipulations due 15 days; discovery cut-off 60 days; exhibits' lists 20 days before trial; exhibits due 15 days before trial, pre-marked; witnesses' lists 20 days before trial; pltf. brief 10-22-73; defts' 11-22-73; pltfs' reply 7 days thereafter; action to be heard 9-17-73, 10:00 a.m. at Alexandria; ent 9-20-73 & filed. Copies mailed judges and counsel.

Sept. 21—Defts' Reply Memorandum in support of Motion to Dismiss, filed. copies mailed judges.

Oct. 2—Pltf's motion to compel answers to interrogatories, rec'd, filed.

Oct. 3—Deft's answers to pltf's preliminary interrogatories rec'd, filed.

Oct. 3—Answer of defts. filed.

Oct. 5—Response of Defts to Pltf's motion to compel answers to Interrogatories filed.

Oct. 5—Plaintiffs' Interrogatories filed.

Oct. 5—Motion to shorten time for Defts to answer Pltf's Interrogatories filed.

Oct. 5—Order directing each deft to answer Plaintiffs' Interrogatories dated 10-5-73 no later than 5 P.M. on 10-19-73 entered 10-5-73, filed. Copies to counsel.

Oct. 5—In Open Court: Merhige, J. Halasz, OCR Appearances: Parties by counsel. Matter came on for hearing on Pltfs' motion to compel answers to interrogatories. Motion heard. Court ruled as follows: Answers to Interrogatories 1-5 are unresponsive except for affirmative

answers; each to be answered in form. Interrogatories 6, 7, 8, 9 are unresponsive and are to be answered. Interrogatory 10(a)(b)(c) and (d) to be answered in 14 days. Pltfs' counsel to prepare sketch for order.

Oct. 5—Order directing defts to file complete and specific answers to Pltfs' Preliminary Interrogatories filed July 11, 1973 no later than 5 P.M. on 10-19-73 entered 10-5-73, filed. Copies mailed to counsel.

Oct. 5—Order directing deft State Board of Pharmacy to provide answers which are more complete than the answers filed on 9-28-73 no later than 5 P.M. on 10-19-73 entered 10-5-73, filed. Copies mailed to counsel.

Oct. 5—Plaintiffs' Proposed Stipulation of Facts filed.

Oct. 17—Defts' List of Controverted Stipulations filed.

Oct. 19—Defts' Second Answer to Plfs' Preliminary Interrogatories filed.

Oct. 19—Answer to plfs' interrogatories submitted on Oct. 5, 1973 filed by defts, with Pharmacy File attached. (copies of pleadings mailed three judges by counsel for defts.)

Oct. 19—Pltfs' Response to defts' proposed stipulations of facts, filed.

Oct. 23—Plfs' Opening Brief on the Merits filed. (copies to judges by plf.)

Nov. 6—Motion to shorten time for defts to answer plfs' interrogatories, filed.

Nov. 6—Plfs' Interrogatories filed.

Nov. 23—Defts' Opening Brief filed.

Nov. 28—Pltfs' List of Exhibits & Witnesses, filed.

Nov. 29—Defts' List of Exhibits and Witnesses, filed.

Nov. 30—Plfs' Reply Brief filed.

Dec. 3—Defts' Answers to Interrogatories filed.

Dec. 3—Pltfs' Exhibits 1-10 recd.

Dec. 4—Order setting hearing at Richmond Division, 12-17-73, 10:00 a.m. ent 12-4-73 & filed. Copies to counsel & judges.

Dec. 5—Exhibits, Part I and Exhibits, Part II, filed by defts.

Dec. 7—Defts' Memorandum in support of motion to re-open discovery filed.

Dec. 7—Motion to reopen discovery filed by defts; "Denied" 12-7-73 & filed. Copies mailed counsel.

Dec. 11—Testimony of pltfs' witnesses filed.

Dec. 12—Stipulation of Facts filed.

Dec. 12—Defts' Objections to Pltfs' witnesses testimony, filed.

Dec. 13—Defts' Additional Authorities filed.

Dec. 12—Statement of Pltfs' Position, filed.

Dec. 18—In Open Court: Bryan, Sr., Mackenzie, and Merhige, Judges, Halasz, OCR, Appearances: Parties by counsel. Matter came on for hearing of oral arguments on merits. Defts' motion to admit into evidence Defts' Exhibits 14, 15, 17, 18 and 20 which have been objected to by the Pltfs heard; motion taken under advisement by the Court. Argument of counsel heard. Case taken under advisement by the Court. (1 Hr. 8 Mins)

1974

Mar. 21—Opinion of Three-Judge Court, filed.

Mar. 21—Final Order of Declaratory Judgment and Injunction restraining defts from enforcement of statute portions declared void; costs awarded to pltfs; ent. 3-21-74, filed. Copies to counsel and judges.

Apr. 1—Defts' Motion to Amend Findings or Judgment or in alternative for a New Trial, filed. Copies to Judges.

Apr. 8—Bill of Costs filed by plfs.

Apr. 8—Affidavit of Raymond T. Bonner filed.

Apr. 17—Transcript of Colloquy at hearing 12-18-73, filed.

Aug. 30—Deft's Supporting Memorandum to amend judgment or for new trial, filed.

Sept. 6—Pltfs' Opposition Memorandum filed.

Oct. 4—Order of Three-Judge Court denying defts' motion to amend findings or judgment and denying motion for new trial ent 10-4-74, filed. Copies mailed.

Nov. 4—Notice of Appeal to Supreme Court of U.S. filed by deft.

Nov. 8—Order directing Clerk to transmit entire case record to U.S. Supreme Court, and requesting that record be returned to this Court at finality of action, ent'd, filed.

Nov. 8—Case record, in 5 vols, del'd to Clerk, U.S. Supreme Court, by Certified Mail.

1975

Mar. 27—Certified copy of order of U.S. Supreme Court noting probable jurisdiction rec'd, filed.

* * *

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Filed July 11, 1973

1. This is an action pursuant to 42 U.S.C. § 1983 seeking to convene a three-judge court to enjoin defendants from enforcing the provisions of Section 54-524.35 of the Code of Virginia (1972 Supplement) which prohibits the publication, advertisment or promotion of the prices of prescription drugs, and to have the same declared unconstitutional.

2. The value of the amount in controversy exceeds $10,000.

3. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

4. Plaintiff Virginia Citizens Consumer Council, Inc. ("VCCC") is a non-profit, non-partisan, volunteer organization incorporated in Virginia, with a membership of approximately 150,000, many of whom are users of prescription drugs. Among its activities are the promotion and protection of the rights and welfare of its members and all consumers throughout Virginia.

5. Plaintiff Virginia State AFL-CIO is a non-profit labor organization with approximately 69,000 members who are residents of Virginia, and many of whom are users of prescription drugs. It actively promotes the interests of its members as consumers.

6. Plaintiff Lynn B. Jordan is a resident of the state of Virginia. She suffers from certain diseases which require her to take prescription drugs on a daily basis.

7. Defendant State Board of Pharmacy is charged by Section 54-524.16 of the Code of Virginia (1972 Supplement) with the regulation of the practice of pharmacy in the state of Virginia.

8. Defendants Thomas F. Marshall, Jr., Charles F. Kingery, Wallace B. Thacker, Linwood S. Leavitt and William R. Maynard, Jr. are registered pharmacists and are the sole members of the defendant State Board of Pharmacy.

9. The Code of Virginia (1972 Supplement) provides in relevant part:

> A. Section 54-524.22:1: "The Board of Pharmacy may refuse to issue, revoke, suspend, refuse to renew any license . . . if it finds that:
>
> (c) He has been guilty of unprofessional conduct as prescribed in § 54-524.35."
>
> B. Section 54-524.35: "A pharmacist shall be considered guilty of unprofessional conduct who . . . (4) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for drugs which may be dispensed only by prescription."

10. As a result of Sections 54-524.22:1 and 54-254.35(4) there is in Virginia no publication, advertising or promotion of the prices of prescription drugs.

11. Because of the prohibition of the publication, advertisement and promotion of the prices of prescription drugs imposed by Sections 54-524.22:1 and 54-524.35(4), plaintiff Jordan and the members of plaintiffs VCCC and Virginia State AFL-CIO are economically harmed:

> A. by being deprived of information as to where the least expensive prescription drugs might be purchased; and

B. by having to pay higher prices for prescription drugs than they would have to pay if the publishing, advertising and promotion of prescription drug rices were permitted.

12. The prohibition of the publication, advertisement, and promotion of prescription drug prices imposed by Sections 54-524.22:1 and 54-524.35(4) and enforced by defendants deprives plaintiff Jordan and the members of plaintiff VCCC and Virginia State AFL-CIO of their right to receive vital information in violation of the First Amendment to the United States Constitution and 42 U.S.C. § 1983.

13. The prohibition of the publication, advertisement, and promotion of prescription drug prices imposed by said Sections and enforced by defendants bears no reasonable relationship to the health, safety, and welfare of the citizens of Virginia, but rather serves only to maintain unnecessarily inflated prices for prescription drugs and to deprive plaintiff Jordan and the members of plaintiffs VCCC and Virginia State AFL-CIO and others of vital information, thus violating the due process provisions of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Wherefore, plaintiffs pray for an order

(1) convening a three-judge court pursuant to 28 U.S.C. § 2284;

(2) declaring that Section 54.524.35(4) of the Code of Virginia is unconstitutional in violation of the First and Fourteenth Amendments;

(3) declaring that Sections 54-524.22:1 and 54-524.35 (4) violate 42 U.S.C. § 1983;

(4) enjoining defendants from enforcing the provisions of said Section 54-524.35(4) which prohibit the publication, advertisement or promotion of the prices of prescription drugs;

(5) granting plaintiffs such other and further relief as may be just and proper; and

(6) awarding plaintiffs their costs and disbursements in this action, including a reasonable attorney's fee.

* * *

STIPULATION OF FACTS

Filed December 5, 1973

Plaintiffs and defendants hereby stipulate to the following facts, without conceding the materiality of such facts or their relevancy to the issues in this case.

I. Parties

1. Virginia Citizens Consumer Council, Inc. ("VCCC") is a non-profit, non-partisan, volunteer organization incorporated in Virginia, with a membership of approximately 150,000, many of whom are users of prescription drugs.

2. Virginia State AFL-CIO is an unincorporated, nonprofit labor organization with approximately 69,000 members who are residents of Virginia and many of whom are users of prescription drugs.

3. Lynn B. Jordan is a resident of Virginia. She suffers from certain diseases which require her to take prescription drugs on a daily basis.

4. The Virginia State Board of Pharmacy regulates the practice of pharmacy in Virginia.

5. Thomas W. Rorer, Jr., Charles F. Kingery, Wallace B. Thacker, Linwood S. Leavitt, and William R. Maynard, Jr. are registered pharmacists and are the sole members of the Virginia State Board of Pharmacy.

II. Practice Of Pharmacy

A. *Education*

6. The School of Pharmacy of the Medical College of Virginia, Health Science Division of the Virginia Commonwealth University requires in its curriculum a course on the history of pharmacy and the background of pharmacy as a professon, orienting students with the practice of pharmacy and telling them something of the traditions of the profession. This course also describes some of the current practices of the profession and opportunities that are available to students once they complete the program in pharmacy.

In the orientation course there are lectures relating to the profession, qualifications of the profession, and ethics of a fundamental nature, as well as a professional nature.

7. The curriculum in the School of Pharmacy is based upon two academic years of college before the student enters into the pharmacy school. The student then completes three years in the School of Pharmacy for a total of five academic years.

The student who enters pharmacy school has qualified himself in pre-pharmacy work—liberal arts, biology, chemistry, physics, English, and mathematics—a total of 63 semester hours of work. In the School of Pharmacy he takes a professional sequence of courses that is designated as pharmacy that runs through his first professional year that would be equivalent to the third college year—organic chemistry, comparative anatomy, quantitative analysis.

The pharmacy sequence continues on into the second and third professional years. He takes biochemistry, physiology, micro-biology, pharmacology, and principles of law and jurisprudence relating to the practice of pharmacy.

And in the final year, he has the opportunity to take elective sequences—blocks of coursework, work that would prepare him for his major interests, such as institutional practice of the profession or the community practice of the profession.

8. The pharmacy student is involved with a rigid, demanding curriculum in terms of what the pharmacy student is expected to know about drugs.

9. The pharmacy students receive their instruction during their final year in pharmacy school in the institution's hospital pharmacies and also make ward rounds with medical and nursing students at the Medical College of Virginia (MCV). They are involved in the whole medical center complex of MCV.

10. Instructors in the School of Pharmacy also hold appointments in the Schools of Medicine, Nursing and Dentistry.

The Virginia Pharmacy school has a tradition that goes back many, many years in utilizing the hospital pharmacies in the instruction of its students in pharmacy so that the students are in the midst of patient care activity.

B. *Professional Aspects*

11. Pharmacy is a profession.

12. Licensure is a requirement to practice pharmacy in the Commonwealth of Virginia and has been a requirement since 1866.

13. Pharmacy is a profession and the individual pharmacist is a professional because (a) there is some particular education or training that is involved, (b) there is a discrete group, by licensure, (c) there is a service to the public.

14. Pharmacists are considered to be one of an important group of health professionals who are concerned with the health and welfare of the citizens they serve. Physicians are one group of professionals who are involved in this team; dentists are a part of the team; pharmacists are; and nurses are part of the team. They are individuals who are competent to make individual professional judgments about their areas of expertise as it relates to the welfare of the patient, and this team should work together to promote the health of the public.

15. The pharmacist today is dealing with drugs of much greater effectiveness (drugs that are designed to do a therapeutic job more effectively) than they were a few years back. The drugs not only have the promise of doing great therapeutic good, but they also have the danger of harm through side effects, misuse, and mishandling. Accordingly, the pharmacist should be in a position to advise and assist the physician in the selection of drugs and to alert the physician to problems such as overdosage, abuse, incompatibility or sensitivities relating to a particular individual.

16. Medication today is more effective in actually curing illness than it was years ago when many medicines only provided for relief from the discomforts caused by the illness.

C. *Retail Aspects*

17. In 1970, total prescription drug expenditures for all Americans were estimated at $9.14 billion.

18. About 95% of all prescriptions are filled by the pharmacist dispensing pre-manufactured dosage forms as opposed to compounding individual prescriptions.

19. The Treasury Department, pursuant to the Economic Stabilization Act, required pharmacists to adhere to the same posting requirements as other retailers. In so doing, the Department stated:

> The dispensing of prescription drugs is considered to be a retail activity, and therefore, it is covered by Price Commission regulations requiring that base prices be posted. The fact that a professional pharmacist is employed to dispense drugs is incidental to the sale of those drugs and does not alter the retail nature of the transaction.

As explained by other Price Commissions rulings:

> The requirement that pharmacists post base prices is in no way inconsistent with their recognized professional standing, but is considered by the Price Commission to be necessary to achievement of stabilization objectives.

20. The acquisition cost to the pharmacist of a particular drug varies depending on the manufacturer and the quantity of the drug purchased.

21. There is no prohibition on the advertising of non-prescription drugs and, in fact, many pharmacies and other retail outlets of such drugs engage in promotion and price advertising of non-prescription drugs. The prices of non-prescription drugs, however, vary between pharmacies throughout the state and in particular localities within the state. For example, in the City of Richmond, the price of Maalox liquid, 12 ounces, an antacid, varies from $1.69

to $0.88, a 92% variance Mylanta liquid, 12 ounces, varies from $2.19 to $1.19, a variance of 84%.

22. (a) In Northern Virginia the price of 25 Darvon capsules (standard dosage) ranges from $2.35 to $3.65, a difference of 55%; the price of 40 Achromycin tablets (standard dosage) from $2.50 to $4.70, a difference of 90%; of 40 Tetracycline tablets (standard dosage) from $1.68 to $3.90, a difference of 132%.

(b) In Richmond, the cost of 40 Achromycin tablets ranges from $2.59 to $6.00, a difference of 140%.

(c) In the Newport News-Hampton, Virginia peninsula area the following variations exist:

(1) Tetracycline: $1.20 to $9.00, a 650% difference;

(2) Achromycin: $2.20 to $7.80, a 241% difference;

(3) Darvon: $1.90 to $4.70, a 147% difference.

(d) A survey conducted by the American Medical Association in Chicago showed price differentials in pharmacies throughout the city of up to 1200% for the same amount of an identical drug.

(e) A study conducted in New York by Consumers Union found that prices for the same amount of one drug ranges from $0.79 to $7.45, and for another drug from $1.25 to $11.50.

III. *Effect Of The Law*

23. As a result of the operation of Sections 54-524.22:1 and 54-524.35(3) of the Virginia Code, there is in Virginia no publication, advertisement, and/or promotion of price information regarding prescription drugs.

24. The State Board of Pharmacy interprets Section 54-524.35(3) as prohibiting a business with pharmaceutical operations in Virginia and outside of Virginia from advertising, publishing, or promoting, directly or indirectly, the prices of prescriptions in the Virginia operations by utlizing advertising media published without the state but which is circulated in Virginia. For example, Peoples Drug Store may not advertise in the *Washington Post* that it has discounts on some prescription drugs if the advertisement directly or indirectly applies to the Virginia operations.

25. Some pharmacies in Virginia refuse to quote prescription drug prices over the telephone for several reasons, one being the mistaken belief that Section 54-524.35(3) prohibits it and another being that consumers may misread prescriptions, thereby leading to misquoted prices. It is the Board's position, however, that the statute does not prevent a pharmacist from quoting the price of prescription drugs to a person orally or by phone upon request.

26. In the absence of Section 54-524.35(3), some pharmacies in Virginia would advertise, publish and promote price information regarding prescription drugs.

27. A significant portion of income of elderly persons is spent on medicine. For some elderly persons it may be more difficult to compare prices between pharmacies than it is for younger persons.

28. Because of the prohibition on the dissemination of information regarding prescription drug prices, Jordan and members of plaintiffs VCCC and Virginia State AFL-CIO are without information from advertisements, publications or promotions as to where the prescription drugs they are required to take might be purchased least expensively. They may, however, attempt to acquire such information by going

from store to store and asking the pharmacist, or by having the physician who prescribes the medication call pharmacists in order to determine the price, or by calling various pharmacies themselves.

29. People who are concerned about the prices of pharmaceutical services, including prescription drugs may discuss them with their pharmacist just as they would discuss the cost of medical services with their physicians.

IV. *Monitoring*

30. Monitoring is the practice pursuant to which the pharmacist maintains a record which includes the customer's age, name, and address; the family unit, if applicable, allergies and drug sensitivities where they are known; the name, quantity, and strength of the drug dispensed; date dispensed and the price to the customer. This information is maintained on "family prescription records" or "profiles."

31. These profiles enable the pharmacist to determine and to advise the patient and/or the physician the type and quantity of such drugs dispensed and how the patient may be affected by such use.

32. Maintaining "family prescription records" involves some additional expense, but they also (a) provide the pharmacy with a patron list for direct mail advertising; (b) cut paperwork and work hours in making charge statements and notations for welfare recipients, special fees for indigents and third-party payments; (c) save time in permitting the pharmacist to furnish quick documentation of prescriptions for tax or insurance purposes. Some pharmacists who do not maintain family prescription records do not do so because of the expense of maintaining them.

33. Some over-the-counter drugs—*i.e.*, drugs sold without the need for a prescription—including aspirin, are antagonistic to prescription drugs. Family prescription records maintained by Virginia pharmacists generally do not list the over-the-counter drugs that customers are taking.

34. Some foods and drinks are antagonistic to prescription drugs. Family prescription records do not list the foods and drinks which a customer consumes.

35. Physicians should maintain a complete medical history on each patient which includes a list of all drugs being taken, even if prescribed by another physician. This is complicated by the mobility of patients, the possibility that they are being treated by more than one prescriber as, for example, an internist, a family practitioner, a gynecologist or obstetrician, ophthalmologist, or dentist. Elderly and poor persons may fall into this pattern of physician use more often that other classes of persons.

36. It is primarily the physician's obligation to ensure that a patient does not take antagonistic drugs and to advise the patient what foods, drinks, over-the-counter drugs and other prescription drugs should not be consumed with the medication which such physician is prescribing. Those pharmacists who maintain family prescription records or who are otherwise familiar with the person's condition and pattern of drug use should advise the customer and/or the physician regarding possible adverse reactions from taking antagonistic drugs, overdosages, and overuse, regardless of which doctor precribes the drug, and some phamacists may also advise their customers which foods, drinks, and other over-the-counter drugs to avoid while taking the particular prescribed drug regardless of which doctor prescribes the drug.

37. According to the U.S. Bureau of Census, of the 4,258,000 persons five years of age or older living in Vir-

ginia in 1970, 1,119,000 were living in a different county or abroad in 1965.

38. Those pharmacies which do monitor do not have the customer's prescription drug history prior to the time he or she moved into the area and began patronizing that particular pharmacy. An interview of the customer to gain such information may be made by some pharmacists.

39. Those pharmacies which do maintain family prescription records do not usually give them to the customer when he or she moves away from the area.

40. Many people patronize more than one pharmacy for a variety of reasons: (a) one may be close to work, another more convenient to home; (b) emergency needs may arise when the customer's usual pharmacy is not open; (c) location in relationship to the doctor's office; (d) free delivery service; (e) non-pharmaceutical items sold in the store may induce the customer to shop there.

41. Section 54-524.35(3) does not prohibit a pharmacy from advertising (a) that it provides delivery service; (b) non-pharmaceutical items; (c) that the customer may have a free coke or cup of coffee while waiting for the prescription to be filled. Any of these advertisings may induce a customer to patronize a pharmacy other than his usual pharmacy.

42. Neither the Code of Ethics of the American Pharmaceutical Association nor of the Virginia Pharmaceutical Association require a pharmacist to maintain family prescription records.

43. The Board of Pharmacy has never promulgated a regulation requiring pharmacists to maintain family prescription records but is considering various proposals.

44. Neither the Virginia Pharmaceutical Association nor the Board of Pharmacy has ever urged legislation requiring pharmacists to maintain family prescription records. The Virginia Pharmaceutical Association with the Virginia Board of Pharmacy has conducted 6 or 7 seminars throughout the Commonwealth explaining and urging the use of medical profile records and the Virginia Pharmaceutical Association does support use of such records.

45. When the customer is aware of the availability of quantity discounts on prescription drugs or that drugs may be obtained at cheaper prices, he may attempt to pressure his physician to prescribe larger quantities of drugs than he would normally prescribe.

The professional integrity of the physician, however, should prevent him from prescribing a larger quantity of medication than is medically necessary in order to allow the patient to take advantage of a quantity discount.

46. Where there is a close physician-patient-pharmacist relationship, the need for family prescription records is diminished by the pharmacist's familiarity wth the patient, his condition, the drugs taken, the frequency with which they are taken, the sensitivity to drugs, prescriber's prescribing habits, all of which he may evaluate to determine whether the dispensing of a particular prescription is in the interests of the patient's health, safety and welfare.

47. Advertising of prescription drug prices encourages the public to shop for their prescription orders when they wish to get them filled, moving from pharmacist to pharmacist. To the extent that customers patronize more than one pharmacy, the ability of pharmacists to formally or informally monitor and maintain a close physician-pharmacist-patient relationship is diminished.

48. In 1958 the Legislature enacted Section 54-426.1 which described it as unprofessional conduct by a pharmacist if he

> "(3) Issues, publishes, broadcasts by radio or otherwise, or distributes or uses in any way whatsoever advertising matter in which grossly improbable or extravagant statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare.

The Legislature in 1968 amended this section by adding subsection (4) which stated:

> "issue, publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate, or credit terms for professional service or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

Acting on the report of a committee appointed by the Governor to study the Virginia drug laws Section 54-426.1 was repealed and reenacted as Section 54-524.35 deleting the word "issue" from subsection 4 but otherwise retaining the language quoted in (3) and (4) *supra*.

In 1971 the Legislature established a committee to again review the drug laws. This committee's report recommended amendment of Section 54-524.35 to its present form. This was adopted by the Legislature in 1972.

49. The Virginia Pharmaceutical Association actively lobbied for enactment of the predecessor to subparagraph (3) of Section 54-524.35.

VI. *Stale Or Adulterated Drugs*

50. It would be unethical, unprofessional and illegal for a pharmacist to dispense a drug which is adulterated or which has become dangerous or ineffective because of age or conditions of storage.

VII. *Position Of United States Government*

51. The statements described below and attached as Exhibits A, B, and C are the positions regarding prescription drugs of the persons and/or agencies who authored them.

A. *Task Force on Prescription Drugs, Reports and Recommendations,* prepared by the U.S. Department of Health, Education, and Welfare;

B. *Research Paper and Policy Statement of the United States Department of Justice Regarding State Restrictions on the Advertising of Retail Prescription Drugs,* 1971.

C. *Remarks By Virginia H. Knauer,* Special Assistant to the President for Consumer Affairs, September, 1972.

* * *

EXHIBIT B

Filed December 5, 1973

Research Paper and Policy Statement of the
United States Department of Justice Regarding
State Restrictions on the Advertising of
Retail Prescription Drugs

The Department of Justice, as the executive agency responsible for the enforcement of the antitrust laws, has received complaints relating to state legislative or administrative restrictions on the advertising of prescripion drugs. Our

experience in analyzing market practices, and our role as advocates for competitive policy, cause us to be particularly concerned over two types of restrictions relating to retail drug advertising: (1) state restrictions prohibiting the advertising or promotion of prescription dugs by name or price, and (2) state provisions restricting the type of drug price advertising which may be used, i.e., preventing the use of terms such as "cut rate" or "discount." Competition is our basic national policy. It has proven to be the most effective spur to business efficiency, innovation, and low prices. Prohibitions on drug advertising represent departures from this national economic policy. Such inconsistencies should be countenanced only when clearly justified in terms of public need.

Twenty-eight states,[1] either by statute or regulation, generally prevent the advertising of prescription drugs by name or price,[2] and 10 states prohibit the use of terms such as "discount" with respect to the advertising of prescription drugs.[3] These restrictions on information have dramatic effects. A survey conducted by the American Medical Association in Chicago, and reported in the New York Times on May 28, 1967, showed price differentials in pharmacies throughout the city of up to 1200% for the same amount of an identical drug. A recent study conducted in New York by Consumers Union found that prices for the same amount

[1] Fletcher, *Market Restraints in the Retail Drug Industry,* (University of Pennsylvania Press, 1967).

[2] *Advertising by Name or Price Prohibited by Statute In:* Florida, Maryland, Michigan, New Jersey, New York, Oklahoma and Texas; *—and by Regulation In:* Arkansas, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts Minnesota, Nevada, Oregon, Rhode Island, South Dakota, Virginia, Washington, West Virginia, and Wisconsin.

[3] Discount Advertising Prohibited by Statute In: California, Maryland and New Jersey;—*and by Regulation* In: Colorado, Louisiana, Maine, Massachusetts, Mississippi, New York and Pennsylvania.

of one drug ranged from $.79 to $7.45, and for another drug from $1.25 to $11.50.[4] Differentials such as these can only exist when they are unknown to potential consumers, for given a choice, most consumers would refuse to pay 10 or 12 times the going price for a drug available elsewhere. The cost to the public of the lack of price competition is enormous. In 1969, $4.0 billion was spent for out-of-hospital prescription drugs.[5]

The Department of Justice believes that the major effect of legislation or regulations prohibiting price advertising of prescription drugs is to reduce retailer incentives to engage in price competiton with resulting higher costs to the public. We submit that sound economic and social policy dictate that any restrictions which have the effect of raising drug costs should be kept to the minimum required by considerations of public safety. Thus the Department urges that the states, which will bear a portion of the burden of high drug prices under the Medicaid program, re-examine the essential premise upon which the advertising restrictions are based;—i.e., that the advertising of prescription drugs will endanger the public health. It is the Department's view that such a premise is largely erroneous and that, to the extent that public health dangers might pose problems, they can be met by methods which stop short of the absolute prohibition of price advertising. The *Final Report* of the HEW Task Force states the problem concisely:

> The present patchwork of State pharmacy laws, regulations, and codes of ethics obviously reflects attempts to cope with a variety of pharmacy problems on a piecemeal basis. Whether they are aimed at the pro-

[4] "What's the Price of an Rx Drug?" 35 *Consumer Reports* 279 (1970).

[5] United States Department of Health, Education, and Welfare, *Prescription Drug Data Summary,* at p. 7 (1971).

> tection of the public health, or the prevention of competition—fair or unfair—is not clear in all cases.

This analysis is supported by a very recent decision of the Pennsylvania Supreme Court invalidating that state's statutory restrictions on drug advertising. *Pennsylvania State Board of Pharmacy* v. *Pastor*, 441 Pa. 186, 272 A.2d 487 (1971). In an extremely cogent opinion, the court dealt with—and rejected—the traditional justifications generally used to support these restrictions.

The first argument was that advertising would encourage excessive use of drugs. The Pennsylvania Supreme Court rejected a trial court finding that, "[T]he promotion and advertising of dangerous drugs and narcotics would certainly to a degree titillate an aberrant person and create an atmosphere of easy availableness." The court noted that this finding appeared to assume either unethical or illegal conduct by doctors and/or pharmacists, an assumption which the court refused to make. The court noted that the sale of prescription drugs was closely supervised and that other statutes, both state and federal, prohibited sales except by prescription. The court concluded that the highly regulated structure of the pharmaceutical profession, together with the fact that the consumer cannot choose his purchases, made it "most unlikely that advertising the prices of retail prescription drugs would, or could, have any impact on the demand or consumption of such drugs."

The second justification argued was that price advertising would make it more difficult for a pharmacist to "monitor" prescriptions of individuals because it would encourage price shopping. The court found that the evidence did not establish the extent, if any, to which monitoring took place, and that, although some courts had accepted this as a justification for restrictions on advertising, even those courts had

admitted that monitoring is "infrequent" and "not completely effective." In addition, the court noted that more direct methods were available to protect against the prescription of antagonistic drugs.

The third and final justification argued was that price advertising might encourage pharmacists to purchase unusually large quantities of drugs, so as to obtain a lesser price, thus creating the possibility that drugs may stay on the pharmacist's shelf for an extended period of time during which they might deteriorate. The court noted that the sale of adulterated drugs was prohibited, and could subject a pharmacist to criminal liability as well as the loss of his license. The court reasoned, "With such stringent provisions, the additional prohibition on price advertsing would certainly appear to be 'patently beyond the necessities of the case.' "

Even after undertaking this analysis, the court expressed reluctance to overrule the statute by "judicial fiat." The final factor which led to its decision was what the court described as "the dampening of price competition in the retail sale of prescription drugs" and its effect on consumers, especially the elderly. After citing the New York study described earlier, the court quoted from the Second Interim Report and Recommendations of the Task Force on Prescription Drugs of the United States Department of Health, Education, and Welfare, a quotation which deserves partial repetition here:

> "There is an obvious need for patients to be able to determine readily the prices charged by the various pharmacies in their community. This appears to be particularly important in the case of long-term maintenance drugs.

> The task force recognizes the difficulties in making such information easily available . . . .
> Nevertheless, if the patient is to maintain the right to select a pharmacy, he also has a right to know the prices it charges and to campare these with other prices."

We believe that the Court's analysis is persuasive and that it should be carefully considered by other states in forming their policies in this area.[6]

Moreover, the Comprehensive Drug Abuse Prevention and Control Act of 1970[7] illustrates that competitive policy can in fact be incorporated into statutory regulations in this area. The Act specifically recognizes the importance of competition; in both the registration of domestic manufacturers and the issuance of import licenses, the statute requires regulatory action to be consistent with the maintenance of "adequate competition." Section 303(a)(1) of the Act directs the Attorney General, in registering manufacturers, to consider the maintenance of effective controls "by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances *under adequately competitive conditions* . . ." Section 1002(a)(2) of the Act authorizes the Attorney General to allow additional imports where necessary to insure adequate competition. Regulations adopted by the Bureau of Narcotics and Dangerous Drugs pursuant to the statute set out specific standards by which competitive determinations can be made, including price rigidity, the extent of service and quality competition, and whether or not

[6] At least one other similar state restriction has been invalidated by a state court. *See* Florida Board of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969).

[7] Public Law 91-513 (Oct. 27, 1970).

substantial differences exist between domestic prices and foreign prices.[8] The primary thrust of the 1970 Act is of course to develop effective controls against the diversion of legitimate drugs into illicit channels. However, it seems clear that the American public should not be denied the benefits of competition in the provision of these substances except as is necessary to carry out the purposes of the Act. Thus, the Act recognizes and coordinates control and competition. Such coordination should be sought by the states in their attempts to supervise the provision of drugs to the public.

Accordingly, it is the Department's view that existing state legislation or regulations which prohibit or restrict price advertising of prescripton drugs may well be adverse to the publc interest. Since such restrictions appear to be unnecessary to protection of the public and result in unjustifiable expenditures by consumers, the Department feels they should be eliminated.

* * *

TESTIMONY OF DEFENDANT'S WITNESSES

Pursuant to the pre-trial conference of December 7, 1973, defendants submit for filing the testimony of the following individuals anticipated to be called as witnesses:

1. Dr. Harold I. Nemuth

2. Dr. Waren E. Weaver

2(a). If Dr. Weaver is not available then Dr. John Andrako will testify—his VITA sheet is attached.

3. Carl F. Emswiller, Jr.

[8] 21 C.F.R. 311.42.

3(a). If Mr. Emswiller is not available then Eugene White will testify.

4. J. Curtis Nottingham

5. Keith D. Kellum

6. Wallace B. Thacker

7. Thomas E. Rorrer

Though joint stipulations cover the subject matter of some testimony it is in a broad general sense only. Counsel for defendants feel that with the specifics from testimony of the above individuals, either by further stipulations or *ore tenus* the general stipulations will have greater significance. Additionally, the testimony of such individuals covers subject matter to which the parties are unable to stpiulate.

Counsel for defendant, however, submits that as to the first four individuals, *ore tenus* testimony is not necessary if their prior testimony in the case of *Patterson* v. *Kingery,* 305 F.Supp. 821 (W.D. Va. 1969) is received.* Such prior testimony is admissible as an exception to the hearsay rule. Its reliability is satisfied since 1) it was given under oath; 2) the identity of issues (1st and 14th Amendment questions) are the same; and 3) there was an opportunity for, and in fact was, extensive cross examination by individuals who had like motives to cross examine about the same matters as would plaintiffs. See *McCormick on Evidence,* 2nd Edition, 1972, Secs. 254-257, pp. 614-621.

* * *

* To that end defendants attach hereto the prior testimony of Dr. Harold I. Nemuth and move for its admission.

PROPOSED TESTIMONY OF WALLACE B. THACKER

Defendants submit that if called to testify in the trial of the aforesaid matter, Wallace B. Thacker would testify substantially as follows:

I am a graduate of the Medical College of Virginia School of Pharmacy, and am licensed to practice pharmacy in the State of Virginia. Presently, I am a member of the Board of Pharmacy and I am a defendant in this suit.

I practice pharmacy in a hospital as opposed to a community setting. However, as a result of my service on the Board, my reading of professional journals and my contract with community pharmacists, it is my opinion that the pharmacists is the one health professional who is best informed and knowledgeable as regards drugs. Of course, the physician who uses a limited number of drugs is generally more familiar with the clinical response and reaction to these drugs than would be the pharmacist. However, most physicians are not that familiar with the other vast number of drugs which they do not specifically use in their practices.

In my practice, I am constantly asked questions concerning drug dosages, the stability of various drugs and their forms, the compatibilities of these drugs with other chemicals, the therapeutic compatibilities of drugs, uses for a particular drug, and the appropriate method of administration for the drug.

As examples, I was asked each of the following questions by physicians during only one day.

1. Can oxytetracycline HC1 be administered in the same intravenous solution as tubocurraine without loss of potency?

2. A warning to a physician that syrup of Hycodan which contains homatropine methyl bromide should not be

given together with tricyclic-anti-depressants, due to excessive anti-cholenergic action.

3. How long is ampicillin sodium stable when mixed with 5% dextrose in water with a PH of 4?

4. Does the color loss of oxytetracycline hydrochloride when mixed with lactated Ringer solution (ph 6.5) indicate loss of potency?

5. May I administer five—fluro uracil by mouth?

6. A caution to a physician on the use of chloral hydrate concomitantly with warfarim sodium because of the possibility of excessive bleeding.

7. Could you suggest a non-alcoholic anti-tussive liquid that may be given to a psychiatric patent?

8. How many milliequivalents of potassium are in twenty million units of potassium penicillium—G and is this enough to cause hyper-alkemia in an aged cardiac patient?

9. A reminder to a physician that the administration of oral contraceptives will result in a "false positive" increase in PPI values for that laboratory test?

10. Reminded physician that administration of cephalo sporins will cause "false positive" urine test for sugar. (Clinitest).

Such questions are not at all unusual and are typical questions that are presented to us daily.

PROPOSED TESTIMONY OF THOMAS E. RORRER

Defendants submit that if called as a witness at the hearing of the above case, Thomas E. Rorrer would testify substantially as follows:

I am Thomas E. Rorrer, a licensed pharmacist in the Commonwealth of Virginia and I am the pharmacist-in-charge at The People's Pharmacy in Waynesboro, Virginia. I am the proprietor of this pharmacy and have practiced there for several years. During the year 1972-73, I served as President of the Virginia Pharmaceutical Association and in July of 1973, I was appointed by the Governor to serve as a member of the State Board of Pharmacy.

During my tenure in office and in serving in various capacities in the Virginia Pharmaceutical Association, I have had an opportunity to travel and discuss professional and economic aspects of pharmacy with practicing pharmacists in all parts of the Commonwealth, consequently, I am quite familiar with pharmaceutical practice in Virginia.

It is my opinion that at the present time there is aggressive price competition between pharmacists throughout the State of Virginia. Because of my familiarity with the economics of pharmacy practice, I am of the opinion that the advertising of prescription prices would not lead to a reduction in those prices to the consumer. My conclusion is based on the premise that obviously, the cost of the advertising must be passed on to the consumer, and it is my opinion that prescription prices such advertising might not result in sufficient increase volume to offset the added cost and thereby result in a savings to any consumer. On the contrary, this practice might result in an increase in some prices.

It is my further opinion that the advertising of prescription drug prices would isolate pharmacy from the other

professions in that pharmacy would be the only profession whereby its professional services were commercialized and advertised.

As a result of this distinction between pharmacy and other professions, our stature as professionals would be diminished in that we would be considered tradesmen as opposed to professionals. This is a ludicrous result in that the product we sell is not a commodity, rather like the lawyer, the physician, the dentist, the architect, we provide the public with a professional service. That service is our knowledge and professional judgment in making several critical judgments and decisions with regard to each prescription that we fill.

Not only would this illogical distinction adversely affect pharmacists who are now in practice, it would have a detrimental effect on the ability of the professions to attract to its ranks capable young men and women who have little interest in being tradesmen though a high interest in a career as a person considered by the community as a professional.

I have utilized the family prescription record system in my pharmacy for several years. In my opinion it is an essential part of the practice of pharmacy and its effectiveness would be severely diminished if members of the public were encouraged to use many different pharmacies.

TESTIMONY OF DR. HAROLD I. NEMUTH

Dr. Harold I. Nemuth would testify that he is a physician with degrees from Columbia University in the City of New York (Bachelor of Arts) and Doctor of Medicine, Medical College of Virginia, Richmond, Virginia. He practices medicine in Richmond, Virginia and has been since 1947. He is a member of the American Medical Association,

the Medical Society of Virginia, the Richmond Academy of Medicine, the Association of Teachers of Preventive Medicine, the American Association of Medical Colleges, the Pan-American Medical Society, the International Gerontological Society, and others. He teaches at the Medical College of Virginia in the School of Pharmacy, the School of Dentistry, the School of Medicine, and the School of Nursing. In the School of Pharmacy he teaches preventive medicine—the relationship of pharmacy and the pharmacist to public health or the health of the public. He has taught that course at the School of Pharmacy for over ten years.

He would testify that the pharmacist has a relation to public health; that the pharmacist is an important member of the health team in relation to the individual's and society's search for assistance with health problems—(Health team includes everyone who has anything to do with the health of a patient—doctors, dentists, nurses, social workers, psychiatric social workers, physiotherapists, technologists, X-ray technologists.)

The pharmacist is the most accessible professional person to the public. The public does not need to call the pharmacist for an appointment. The pharmacist is available during the entire period that he is on duty, and indeed, on occasion when he is not officially on duty, for consultation by any individual who wants advice in regard to his medical problem, his health or a particular illness. And as such, the pharmacist functions as a professional member of the health team. In short, though the pharmacist does not practice medicine, he advises.

Besides practicing medicine, the witness has lectured to pharmacists and has worked in pharmacies. As a physician the witness would testify that he relies on pharmacists con-

stantly and frequently. For example, the witness relies on pharmacists in correcting minor errors in dosage that may be on prescriptions, thus enabling him to correct the dosage. Pharmacists have called him to advise: that a prescription is not exact as to dosage; that dosage may be too little or too much; that a dosage is antagonistic in relation to other drugs that the patient may be taking about which the doctor had no previous knowledge; that the patient is receiving medications from other physicians about which the doctor had no knowledge. This occurs to any physician. Further, as a physician the witness will testify that he on occasion calls a pharmacist to inquire about a drug before writing a prescription. The witness will also testify that he has a Physicians' Desk Reference (PDR) which lists drugs but that he still has to rely on the pharmacist because (1) the PDR does not delineate information that he seeks in terms of the practical applications of a particular drug; (2) the PDR contains information in such a minute detail that it would take an unnecessary amount of time to glean information that he can get from a pharmacist who knows more and should know more about a particular drug than a doctor might know about a particular drug.

Lastly, the witness would testify that on many occasions the pharmacist aids in combating drug abuse by assisting him in insuring that one of his patients has his prescriptions refilled timely or is not refilling them too frequently.

A physician attempts to learn a patient's background but cannot always keep complete records. The pharmacist is of much more importance today because many pharmacists keep professional records of allergies, sensitivities, and reactions that patients may have had to drugs. Doctors therefore may obtain information from pharmacists in this regard. The PDR naturally does not tell which patient is allergic to what drug. This is a clinical determination, in

which the pharmacist assists. All new patients fill out a form which asks whether the patient has ever been treated by another doctor and whether the patient has been taking any medication during the previous six months. These forms are checked periodically by the physician. The physician is responsible for the medication prescribed, and it is the physician who is responsible for adverse reactions which the consumer may suffer from taking antagonistic drugs. It is possible that a pharmacist is also responsible for such adverse reactions.

Summary

In general Dr. Nemuth's testimony would revolve around two points: (1) how a physician relies upon pharmacists in the dispensing of medications for patients and (2) that such reliance is needed and must be continued since physicians, though attempting to get a medical background on each patient, cannot always be sure that their records are complete nor do they always know what drugs are being prescribed by other physicians.

TESTIMONY OF DR. WARREN E. WEAVER

In case of the possible unavailability of Dr. Weaver, Dr. John Andrako would provide the following testimony. Dr. Andrako is presently Assistant Vice President of the Medical College of Virginia, Health Sciences Division of Virginia Commonwealth University. He holds Bachelor and Master degrees from Rutgers University and a PhD in Pharmaceutical Chemistry from the University of North Carolina. He had previously served as a professor of pharmacy as well as Assistant Dean, School of Pharmacy, MCV. He is or has served on various state and national committees on phar-

macy and pharmacy education; he has served or serves on twenty different university committee and is a member of such organization as the USAN council—the official body which designates names of new drugs; he is a member of the American Pharmaceutical Association, the Virginia Pharmaceutical Association, the American Chemical Society, the American Association of Colleges of Pharmacy, the Medical Chemistry Section of the Academy of Pharmaceutical Sciences, the Virginia Section of the American Chemical Society, the National Clinical Pharmacy Conference Ad Hoc Steering Committee.

Dr. Warren E. Weaver would testify that he is Dean of the Virginia Pharmacy School and has been since 1956. He holds the following degrees: a B.S. in Pharmacy from the University of Maryland, awarded in 1942, and a Ph.D. with a major in Pharmaceutical Chemistry, awarded in 1947. He is a member of the American Chemical Society and has been since 1942, a member of the American Pharmaceutical Association, a member of the Virginia Pharmaceutical Association, the Virginia Society of Pharmacists. Friends of Historical Pharmacy, American College of Apothecaries, among others. In the American Chemical Society, Virginia Section, he has been Secretary, Treasurer, Vice Chairman and Chairman of the Section. He has been Editor of the publication of the Virginia Section of the American Chemical Society, Treasurer of the Virginia Pharmaceutical Association, Secretary-Treasurer of Friends of Historical Pharmacy and President of Friends of Historical Pharmacy. As Dean of the School of Pharmacy he belongs to the American Association of Colleges of Pharmacy and is past President of that organization and a member of the Executive Committee of that organization as well as having held several committee posts and chairmanships of committees

for the Association. He is also a member of the Board of Directors of the American Foundation for Pharmaceutical Education, which is not a membership organization but is an organization that operates in the field of education in pharmacy. In addition, the School is very much interested in programs such as the Regional Medical Program and he holds posts with respect to the Virginia Regional Medical Program.

In the School of Pharmacy he teaches ethics, which is a discussion course for senior students in the School of Pharmacy.

Either Dr. Weaver or Dr. Andrako would testify that pharmacy is a profession. One of the requirements to practice pharmacy in the State of Virginia is licensure. Licensure has been a requirement in Virginia since 1886. Secondly, there is a particular education or training that is involved; there is a discreet group, and thirdly, there is a service to the public. The witness would testify about the curriculum at the School of Pharmacy. That in terms of what the pharmacy student is expected to know about drugs (their chemical composition and reactions of such chemicals as opposed to clinical reactions) the curriculum is certainly more rigid than the education required of the physician. This is indicative of their background and their role on the health team. Though a very small percentage of drugs today are compounded the pharmacist's role is not decreasing. The pharmacist today deals with drugs of much greater effectiveness and which are designed to do a therapeutic job more effectively. The drugs not only have the promise of doing great therapeutic good, but they also have the danger of harm through side effects, misuse, and mishandling. Consequently, though the pharmacist is doing less compounding on the premises, the pharmacist is working more with his

head and is much more concerned with how this drug is working with the patient in terms of controlling the safety of the dose of the medication as the physician has ordered it on his prescription order. In 1942, for example, much of the medication that was prescribed was medication that was only palliative. In short, there was previously more art to the profession than science.

Ethics of the profession of pharmacy formally goes back, in terms of the written word, to the Middle Ages, back into the 1220's.

In the witnesses' opinion, it is not in the best interest of public health to permit advertising of prescriptions. First, advertising of prescription drug prices encourages the public to shop for their prescription orders when they wish to get them filled, moving from pharmacist to pharmacist. This defeats the public in that they no longer have available one of the most important services that pharmacists are able to deliver for their patrons, the service that can be provided by the pharmacist who utilizes prescription records or pharmacists who, through long years of experience and knowledge of a particular individual and his family, have come to know many of the pharmaceutical idiocyncrasies in terms of drug allergies and diseases such as diabetes and the like that might conceivably be involved whenever a patient procures a drug or has a prescription order completed.

Secondly, advertising of prescription drug prices puts pharmacy, the profession directly in the commercial market place in a way that demeans the profession in the eyes of the public and other professionals. The idea that the product is the sum and substance of the only professional service that is related to the pharmacy and to the pharmacist is incorrect. The pharmacist does much besides deliver a drug

product. And commercial advertising that would indicate that all that is involved is the delivery of a product is demeaning to the profession.

In fact, it would be harmful to the public if they shop for prices in this kind of commercial atmosphere, taking what appears to them to be the least price for a product, and they have unknowingly bought something less than they could have purchased elsewhere. This does not mean that if pharmacy were put in the commercial market place, pharmacists would dispense inferior drugs.

People who are concerned about the prices of pharmaceutical services should discuss it with their pharmacist just as they would discuss medical services with their physicians, and the cost of them. Finally, as an educator the witness would testify he has a real concern about prescription pricing, because the more the image is projected to the public that all there is in pharmacy is a prescription product that is counted and poured and sold like tires or any product that does not involve any service other than counting, pouring, and delivering to the individual, the more it means that those in pharmacy education are not going to get the share of those individuals who enter the health professions with the ideal of serving mankind through helping them in their illnesses and difficulties associated with illnesses. If one appeals only to the commercially oriented, inevitably the public will be hurt; because one will not get the kind of individuals who should be entering the profession capable of providing the quality of health care that the citizens of the United States are entitled to receive, and particularly in the Commonwealth of Virginia. The witness would state, however, that naturally pharmacists intend to make a profit.

TESTIMONY OF KEITH D. KELLUM

Defendants state that if called as a witness in the trial of the above matter, Keith D. Kellum would testify substantially as follows:

That I graduated from the University of Houston Pharmacy School with a Bachelor of Science in Pharmacy in 1967 and in that year was licensed as a pharmacist in the State of Texas. For the three years preceeding my graduation, I worked in the Pharmacy Department of a community pharmacy. For the last three years I have been the Executive Secretary of the Virginia Pharmaceutical Association. I am an active member of the National Association of State Pharmaceutical Association Executives, a member of the American Pharmaceutical Association, the National Association of Retail Druggists, the Virginia Society of Hospital Pharmacists and several other professional and civic organizations.

In my capacity as Executive Secretary of the Virginia Pharmaceutical Association, I have extensively traveled over the entire state of Virginia visiting pharmacists, pharmacies and pharmaceutical association meetings, and performed other duties with offices of the Association as would be expected of an executive officer of such an organization. As a result of my contact with pharmacists around the state, my participation in national pharmaceutical association meetings and extensive readings of professional journals, I am quite familiar with the practice of pharmacy on a national scale and am particularly familiar with the practice of pharmacy in the state of Virginia.

In my capacity as Executive Secretary of the Virginia Pharmaceutical Association during the year 1971-1972, I organized and attended six regional continuing education seminars which were conducted throughout the State of

Virginia. All pharmacists licensed in this state, whether members of the Virginia Pharmaceutical Association or not, were invited to attend the seminars. The theme of the seminars conducted during the year 1971-72 was the use of family prescription records. Several persons spoke at each of these seminars and the purpose was to educate pharmacists as to the use and benefits of family prescription records and to encourage pharmacists to utilize family prescription record systems. About four hundred pharmacists attended the seminars. From responses obtained from the 400 plus attendees at these seminars, it was determined that at least fifty percent utilized family prescription records in their practices. Although specific figures are not available, I have determined from my discussions with pharmacists throughout the state, from information given to me by way of the officers of the various district associations throughout the state that not less than thirty percent of the pharmacies in the state of Virginia utilize family prescription record system at this time.

It is also my opinion that if the advertising of prescription prices were allowed, the advantages of family prescription record systems would certainly be minimized, as a tool to protect the public health. I draw this conclusion because the effectiveness of the family prescription record system is dependent upon the patient utilizing one pharmacy as opposed to many pharmacies. I have sufficient respect for the effectiveness of advertising and advertising techniques to realize that their sole effect is to cause consumers to utilize a particular product or business. As pharmacies begin to compete on the basis of price advertising, the natural result would be that consumer would shop from store to store.

It is also my opinion that prescription drug prices would not be reduced if advertising were allowed. I draw this

conclusion for several reasons. First, advertising of any type is expensive. Whatever cost is incurred in advertising would be, of necessity, passed on to the consumer. Secondly, that persons who responded to an advertisement for a particular prescription drug by going to a pharmacy different from his regular supply for a refill prescription would result in requiring the pharmacist to call the original pharmacy for a copy of the prescription and also call the physician for refill authorization. This is much more time consuming than the regular pharmacists, filling of a prescription which the physician has previously authorized to be refilled. A pharmacist is not authorized to refill copied prescriptions. This would result in extra man power and extra costs to the pharmacy. Of course, increased volume might offset this added expense, but in my opinion, such volume would not be generated.

Thirdly, it is my opinion that at the present time competition is very keen between pharmacies, both independent and chain, and the addition of price advertising would not result in driving these prices lower. My support for this comes from figures in the 1973 Lilly Digest which reveals that the net profit for the prescription section of a pharmacy is much lower than it has been in several years. In fact, these figures reveal that on a national basis the net profit of pharmacies is only 3.6 of the total sales. Lilly Digest also reveals that the national average for prescription drugs is $4.38 as opposed to the average price in the state of Virginia which is $4.09. U.S. Department of Labor statistics reveal that as opposed to the cost of other goods and services, the unit cost of prescriptions has, in the last thirteen years, decreased by thirteen percent.

In my position, I am also in constant contact with the officers and members of many other business and professional groups. From the attitudes that I have discerned

from these people, if pharmacy were singled out as the only profession which was allowed to advertise the prices of its services, the stature of the profession would be lowered.

I also unequivocably oppose the notion that the dispensing of a prescription drug is the sale of a commodity and is the same as selling automobiles, aspirin, chewing gum or any other such commodity. When the patient received his bottle of medication he is not receiving simply twelve capsules of an antibiotic, he also is receiving the benefit of the professional judgment of the pharmacist. Irrespective of how simple the particular prescription may be, the pharmacist must apply his professional judgment and skill to the interpretation of the prescription, the interpretation and in many cases, the evaluation of the dosage stated on the prescription, the communication of that dosage instruction, in an intelligible way, to the patient, the selection of the appropriate drug, including the strength, the ability to distinguish between dosage forms which appear similar, the selection of appropriate containers for dispensing to assure that the product does not deteriorate as a result of exposure to light, moisture, temperature, etc., and, possibly, where the physician has prescribed a generic drug— which is less than 20% of the time, selecting a specific brand so as to assure that the patient receives a high quality, effective product. The steps that I have just enumerated are ingredients which are necessary for the filling of even the simplest prescription and I have not attempted to delve into situations which are complicated by, refilling, possible drug abuse, possible improper instructions for use, etc. In dispensing this prescription, the product received is no more a commodity than is a deed or will prepared by an attorney, a denture supplied by a dentist or sketches supplied by an architect.

TESTIMONY OF CARL F. EMSWILLER, JR.

Carl F. Emswiller, Jr. would testify that he has been a pharmacist since 1962 and has a pharmacy located in Leesburg, Virginia at 3 South King Street. He attended the Medical College of Virginia, Pharmacy School and has previously worked in Berryville, Virginia for Eugene V. White from 1962-1968. Eugene White was a pioneer in establishing medical profile records.

When he fills a prescription the witness would testify that he looks at it to determine what it is and the patient's name, then types out a label and fills it with the apppropriate medication. First, however, the receptionist pulls the patient's family record card. This is surveyed with the prescribed medicine in mind, to see that there are no contraindications and that there are no reasons the patient cannot take this medicine for one reason or another. The family record card contains the husband's name, the wife's name, their address, their phone number (for an emergency—the husband's place of employment) any known drug sensitivities or allergies or idiosyncracies the children's names and ages and nicknames (in case the proscription is written in the nickname). The date the prescription is filled is recorded and the prescription number, and each time it is refilled, the amount of medication dispensed, what the medication was, the strength of it, and the fee that was charged. Mr. Emswiller also records medication dispensed for family pets.

The witness would testify that the family record card is valuable from a pharmacist's point of view, from the physician's point of view and the patient's point of view. First, the card provides the pharmacist, with a complete drug history of the patient. This enables him to ensure when he fills the prescription, that there are no known contraindications occurring—allergies, etc. If the patient forgets a prescrip-

tion number or throws a bottle away, the pharmacist can check back, thus aiding the patient and for example, saving them a drive back home. Lastly, physicians often use the card e.g., if they are on a house call and they don't have a patient's chart before them, they will call in and ask the Pharmacist about allergies. A specific example* is a hospital anesthetist called and said that he had a patient who was getting ready for surgery. The patient was taking blood pressure tablets but he didn't know what the name of the medicine was. All the patient knew was that he was taking little green tablets. He didn't have a prescription or anything to refer to. So, the anesthetist called and was told, in a matter of seconds, what the medicine was Salutensin which contains Reserpine. (Reserpine will potentiate anesthetics). The anesthetist commented "That is a good way for me to look up and see no blood pressure at all." Emswiller feels therefore that it is really worthwhile to have his family record system. Though one of the purposes of the record is to provide the patient records for income tax purposes, the whole thing in reality is geared for the safety of the patient. Information from the patients as to the sensitivities and allergies is obtained when the patient comes into the pharmacy for the first time. The receptionist goes out and shows the patient the blank card and expains what the record is and how it is used. Then the appropriate information is obtained by interview. Other specific examples are where one physician has prescribed something and then the patient goes to another physician. One example* is where a patient has been taking Tofranil and was prescribed Parnate by another physician. Both drugs are in the tranquilizing field—one is a potent monoamine oxidase inhibitor and they are contraindicated drugs.

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* These incidents occurred in approximately 1968 or 1969 as testified to by Mr. Emswiller in a deposition on June 26, 1969 in the case of *Patterson* v. *Kingery*.

Tranylcypromine would be the generic name. When the patient came in with a prescription for the Parnate, Emswiller knew that there should be a two-week period between taking one after the other. So, he called the physician and told him what the patient had been taking—that just a couple of days before there had been a refill. The doctor changed the medication.

Additionally, a pharmacist is always asked to recommend what patients should take for a cold, or sniffles, etc. There are many over-the-counter preparations (OTC) containing antihistamines or decongestants which should not be taken with certain legend drugs. Any of the monoamine oxidase inhibitors are prime examples. His medical record system assists him in recommending OTC drugs, e.g. "Can you take Coricidin with any of the medicine you are taking?"

In short, when patients ask for an over-the-counter recommendation, he pulls their record and takes a look at it before the determination of what to recommend. If the patient is taking Thyroid, then the witness would not recommend something with a decongestant or antihistamine in it since these things are contraindicated. True, a patient can purchase OTC drugs not only at a drug store, but also at food chains and everywhere else. You cannot be one hundred per cent accurate in such instances, but as a professional you should do all that is possible. The family record card is a giant step in the right direction. The family record system is also helpful in drug recalls. There is no reason why the lot number can not be recorded. The bottle the drug comes in has a lot number from the manufacturer. For control purposes with the lot number recorded one could trace down every tablet on a drug recall that was dispensed through a particular pharmacy. For example, in drug recall incidents, if all the pharmacies in the United States

maintained profile records and recorded the lot numbers thereon, all of the defective drug could be recalled.

Mr. Emswiller has spoken on the medical record system at Rutgers University at the New Jersey Pharmaceutical Association and the New Jersey Society of Hospital Pharmacists. Also at a convention of the American Pharmaceutical Association he helped staff a pharmacy that was built by McKesson & Robbins on the order of the pharmaceutical center, in which the patient record was used, and explained the patient record and how it could be of advantage to pharmacists in their practice.

The witness belongs to the Virginia Pharmaceutical Association, the American Pharmaceutical Association, The Academy of General Practice of the American Pharmaceutical Association and the Virginia Association of Professions.

The family record system also aids in the taking of maintenance drugs and even birth control pills. The card is a drug history. Thus, if a patient doesn't take medication, the pharmacists knows, if he keeps a "tickler" system, that they don't take the medication. The witness would testify that he does not keep a tickler system nor does he know of any pharmacist who does. He, however, attempts by instinct and memory to use the cards in assisting people in drug maintenance. If it is a patient, for example, who was in a mental institution and is home for a tryout period and they suddenly didn't get their medication, the pharmacist could phone the physician or the family and let somebody know that the patient wasn't taking his medication. The card assists a patient by keeping them on a steady maintenance.

In conclusion, the pharmacist can be an effective aid in using the patient record in determining patients are taking their medicine and are receiving proper medicine. The card

system is not going to be one hundred per cent effective. But there is nothing one hundred percent effective. The system, to the extent it helps promote the safety and well-being of the public, is a valuable tool. The system is becoming more and more in use and among the pharmacists the witness knows it is on the increase in usage.

TESTIMONY OF MR. J. CURTIS NOTTINGHAM

Mr. J. Curtis Nottingham would testify that he is a practicing pharmacist in Williamsburg, Virginia. He is a member of the Chesapeake Pharmaceutical Association, Virginia Pharmaceutical Association and the American Pharmaceutical Association, and has served as President in each. He has two pharmacies in Williamsburg, Virginia—Nottingham, Pharmacy, Incorporated, Williamsburg, and Nottingham Terrace Pharmacy, Incorporated, Williamsburg. He employs the family record system in both drug stores. The system is used for income tax purposes and to enable patients to identify drugs in case they have lost their prescriptions and where a patient is under the care of more than one physician, the local physician can call to find out the nature of the medication that may be prescribed by a specialist in a nearby city. He also has occasions to call the physician because of a question that arises as to the appropriateness of medication that may have been prescribed either by the local physician, or the out-of-town specialist, the medication being in conflict, possibly with something already previously prescribed. The card system is what causes such questions to arise and enables the pharmacist to perform his true professional service. The witness would consider it a gross handicap to attempt to carry on his professional services without this record.

* * *

TESTIMONY OF PLAINTIFFS' WITNESSES

Pursuant to the pre-trial conference on December 7, 1973, submitted herewith for filing are the testimonies of those persons whom plaintiffs anticipate calling as witnesses.

* * *

TESTIMONY OF MYRON D. WINKELMAN

If Myron D. Winkelman were called as a witness he would testify substantially as follows:

1. I have been a registered pharmacist for 14 years, during which time I have worked in and with both independent and chain pharmacies. I am currently Vice President for Professional Services for Revco D.S., Inc., a publicly held company with headquarters in Cleveland and pharmacies throughout the United States, including 40 pharmacies in Virginia.

2. Of the more than 20 million prescriptions which Revco pharmacies fill annually, over 99% require no extemporaneous compounding, rather the pharmacist selects the prescribed pre-manufactured dosage form.

3. Since there is no legal, professional or ethical requirement to maintain family prescription records, Revco pharmacies do not maintain them. During the past eleven years, Revco pharmacies have filled over 75 million prescriptions and to my knowledge there has never been a claim by any customer against any Revco pharmacy for having dispensed antagonistic drugs.

4. Although pharmacy is a profession, it is somewhat unique in that pharmacists are not directly compensated for the professional services they render, but rather for the products they sell; therefore when we advertise the

availability of lower prices for prescriptions at Revco we are not referring to the professional services the pharmacist renders but to the price of a commodity. We pay our pharmacists among the highest salaries in the profession in order to attract the best pharmacists. But the salary doesn't vary with the price of the prescription, nor with the number of prescriptions dispensed.

5. Revco has a discount plan for persons over 60 and under 5 years of age, who are entitled to a 10% discount on all of their rescription drugs purchased at Revco. Revco is prohibited from disseminating information about these plans in Virginia. It is my opinion that if the advertising and promoton of these plans were permitted—as for example with promotions similar to those displayed in plaintiffs' exhibits 11(B) & (D)—the number of persons utilizing them would increase significantly. My opinion is based in part upon the fact that where after a prohibition on advertising such programs was eliminated, there was a 300% increase in program utilization at Revco within a six month period.

6. One of my primary responsibilities during my 11 years with Revco has been establishing the prices which Revco pharmacies charge for prescription drugs. When Revco enters a market area, it conducts a thorough study to determine what the prevailing prescription drug prices are, and it conducts regular periodic studies thereafter.

7. Our studies have revealed that in those geographic areas where Revco is permitted to advertise information about the variances in prescription drug prices, such prices in that area generally decline. On the other hand, in those geographic areas, such as Richmond, Virginia where Revco is prohibited from disseminating information about its prescription drug prices, such prices do not decline as significantly, if at all, as in those areas where Revco advertises.

8. It is my opinion that if advertising of prescription drug price information were permitted in Virginia, the prices for many presription drugs would be lower.

* * *

TESTIMONY OF DR. SIDNEY WOLFE

If Dr. Sidney Wolfe were called as a witness he would testify substantially as follows:

1. I am a licensed physician, a former staff member of the National Institutes of Health, and currently the director of the Health Research Group, a non-profit organization concerned about health and safety matters.

2. It is primarily the physician's responsibility to insure that patients do not take drugs which in combination with other drugs produce adverse reactions. Consequently, physicians maintain complete medical histories on each patient, which history includes the names of other doctors who are treating the patient as well as all drugs which the patient is taking. The doctor should also advise the patient what foods, drinks, and non-prescription medicine should not be consumed with the medication which the doctor is prescribing.

Many persons patronize more than one pharmacy for a variety of reasons—one may be closer to home, another more convenient to work, and a third in the building where the doctor has his office; one may provide free delivery; and emergency needs may arise when the customer's regular pharmacy is closed. Consequently, it is necessary for physicians to have a complete medical history on each patient.

4. Physicians do have occasion to consult pharmacists for advice. However, it is my opinion that allowing phar-

macists to advertise will not interfere with the physician-pharmacist relationship. Physicians will continue to consult pharmacists as they do today.

* * *

DEFENDANTS' OBJECTIONS TO TESTIMONY OF PLAINTIFFS' WITNESSES

Filed December 11, 1973

Pursuant to the pretrial conference of December 7, 1973, defendants herewith submit their objections to the proposed testimony of plaintiffs' witnesses.

1. *Testimony of Myron D. Winkleman*

Defendants concede that if called as a witness Winkleman would testify substantially as indicated. However:

A) Such testimony which treats the dispensing of drugs as a product only (Winkleman test. ¶¶ 3 and 4) is directly refuted by the testimony of defendants' witnesses. See e.g. Nemuth, Emswiller, Weaver, Nottingham. All testify 1) the pharmacist delivers a service not a mere product and 2) family prescription records are needed.

B) The testimony that Revco discount plans are not implemented in Virginia (Winkleman test. ¶ 5) is in direct conflict with the decision in *Patterson* v. *Kingery*, 305 F. Supp. 821 (W.D. Va. 1969) allowing implementation of such plans and Board of Pharmacy regulations allowing in pharmacy advertising. See Reg. 14 c(1) and (2). That an increase in utilization of such plans would occur with advertising has no basis; demonstrated no knowledge of Virginia economy and is merely an overt attempt to relitigate *Patterson* v. *Kingery*.

C) The testimony that with advertising drug prices would lower (Winkleman test. ¶¶ 7 and 8) is directly refuted by defendants' witnesses—Kellum and Rorrer.

Defendants object to any inability to cross examine. See *Louisiana* v. *National Ass'n for Adv. of Col. People*, 366 U.S. 293 (1961) at 298.

2. *Testimony of Dr. Sidney Wolfe*

Defendants concede that if called to testify Wolfe's testimony would be substantially as indicated.

However, defendants point out:

A) Testimony as outlined in ¶ 2 of Wolfe testimony is directly refuted by defendants' witnesses Nemuth, and Emswiller as well as by common sense. A physician does not and cannot keep all inclusive records; a pharmacist plays a key important role in the dispensing of drug medication.

B) Testimony as outlined in ¶ 4 is also refuted for example by Emswiller. It is the physician-patient-pharmacist that must be maintained. This aspect is ignored by the Wolfe testimony.

C) There is no foundation that the witness is at all familiar with Virginia practice. As outlined his testimony has no reliability. Defendants object to any lack of opportunty for proper cross examination. See *Louisiana* v. *National Ass'n for Adv. of Col. People, supra.*

* * *

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, *et al.*,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Eastern District of Virginia

MOTION TO DISMISS

ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorney for Appellees

RAYMOND T. BONNER
433 Turk Street
San Francisco, Calif. 94102
(415) 441-4771
Of Counsel

February 21, 1975

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-6537

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IN THE

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No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, *et al.*,
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v.

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Appellees.

On Appeal From The United States District Court For The Eastern District of Virginia

---

MOTION TO DISMISS

PRELIMINARY STATEMENT

On January 20, 1975, appellants served and filed their jurisdictional statement seeking review of a unanimous decision of the three-judge court sitting in the United States District Court for the Eastern District of Virginia which enjoined appellants from enforcing §54-524.35(3) Virginia

Code (1972 Supp). It is the position of appellees that the question presented by appellants is substantial, that it meets the requirements for plenary consideration by this Court set forth in Rule 15.1(f), and that a motion to affirm under Rule 16.1(c) is not appropriate. However, appellees believe that this Court lacks jurisdiction over this action because the appeal taken was not timely. In the event that this Court should conclude that the appeal was timely, appellees do not oppose the request of appellants to have this case set down for full briefing and argument although they fully support the decision below.

QUESTION PRESENTED

Is the time for filing a notice of appeal tolled where a motion pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure is filed within the 10 day time limits contained in such Rules, but the motion sets forth only the most general reasons in support thereof and is not accompanied by a brief as required by the Local Rules of the district court in which the action is pending?

RELEVANT AUTHORITIES

28 U.S.C. §2101(b)

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

Rule 4(a), Federal Rules of Appellate Procedure

In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy

or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such

an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Rule 6(b), Federal Rules of Civil Procedure

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 7(b)(1), Federal Rules of Civil Procedure

Motions and Other Papers.

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Rule 11(F), United States District Court for the Eastern District of Virginia

Briefs Required: All motions, unless otherwise directed by the Court, except motions for (1) a more definite

statement, (2) an extension of time to respond, unless the time has already expired, (3) production of documents, (4) compelling answers to interrogatories, (5) default judgment, (6) objections to interrogatories, and (7) motions relating solely to processes of discovery, shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies. The opposing party shall file his response, including a like brief and such supporting documents as are then available, within ten days thereafter. For good cause, the responding party may be given additional time or may be required to file his response, brief and supporting documents within such shorter period of time as the Court may specify.

STATEMENT OF THE CASE

On July 11, 1973, an individual who is in frequent need of prescription drugs and two groups suing on behalf of their members who utilize prescription drugs filed the complaint in this action seeking to declare unconstitutional and enjoin the enforcement of a Virginia statute which prohibits the advertising of the price of prescription drugs, §54-524.35(3) (1972 Supp). As consumers of prescription drugs, plaintiffs claimed that the statute abridged their First Amendment right to receive essential information concerning the prices of these drugs and that the justifications alleged by the State for such restraints were insufficient to support the statute. Accordingly, they contended that their rights under 42 U.S.C. §1983 were violated and that the court had jurisdiction pursuant to 28 U.S.C. §1343(3) to enjoin such violation. The complaint also sought the convening of a three-judge court, which was ordered on July 20, 1973. Discovery proceeded expeditiously, and

the parties thereafter entered into a Stipulation of Facts. Thus, the hearing before the three-judge panel on December 18, 1973, was entirely consumed with an argument on the law.

Slightly more than three months later on March 21, 1974, the court (Bryan, Senior C.J.) rendered its unanimous opinion and entered its order granting the relief sought. After noting the decisions of this Court which recognize the right under the First Amendment to receive information,[1] the court observed that a prior challenge to this statute brought by sellers of prescription drugs, *Patterson Drug Co. v. Kingery*, 305 F.Supp. 821 (W.D. Va. 1969), was not dispositive since the interests of consumers were neither discussed nor represented in that case (App. 7). It further observed that this Court's decision in *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 384 (1973), "somewhat tempers" the claimed exclusion from the First Amendment for commercial advertising enunciated in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), so heavily relied on by appellants. After noting that similar laws had been stricken down by state courts in Florida, Pennsylvania, and Maryland, the court rejected as not dispositive the other authorities which allegedly support the statute.[2] It found

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[1] Appendix to the jurisdictional statement 6 (hereafter "App") citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-764 (1972) and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[2] *Head v. New Mexico Bd of Dental Examiners*, 374 U.S. 424 (1963); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935); and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

that none of them dealt with a situation similar to this because here the prospective patient is fully protected by a written doctor's prescription which can be filled only by a licensed pharmacist (App. 8). The justifications offered by the State were thereafter rejected as "not convincingly explained" and "wholly untenable", and the decision was rendered in plaintiffs' favor (App. 9). The court's conclusion in granting the relief sought bears repetition (App. 9):

> The right-to-know is the foundation of the First Amendment; it is the theme of this suit. Consumers are denied this right by the Virginia statute. It is on this premise that we grant the plaintiffs the injunction and the declaration they ask. *Id.*

Although this Court has never overruled *Valentine*, nor specifically limited its applicability, it is doubtful that its broad exclusion of commercial advertising from the First Amendment is still valid. See *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, concurring) and *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n. 6 (1974) (Brennan, dissenting). Thus, the decision below follows a number of recent lower federal court cases holding that the First Amendment precludes a ban on advertisements which merely provide information about lawful activities. *E.g.*, *Hiett v. United States*, 415 F.2d 664 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (advertisements designed to solicit Mexican divorce business); *Associated Students for the University of California at Riverside v. Attorney General*, 368 F.Supp. 11 (C.D. Calif. 1973) (three-judge court; abortion advertisements); *Atlanta Cooperative News Project v. United States Postal Service*, 350 F.Supp. 234 (N.D. Ga. 1972) (three-judge court; abortion advertisements in a newspaper). The result in the district court here, as in those

cases, is readily distinguishable from *Pittsburgh Press, supra,* where the advertisement for a job on a discriminatory and unlawful basis would have aided the commission of an illegal act. Contrary to the assertions of appellants, the decision below follows well-established precedents, albeit none from this Court which are directly controlling. Accordingly, but for the jurisdictional defect relating to the timeliness of the appeal, appellees would agree that the question presented is appropriate for further consideration by this Court.

Because the sole issue on this motion to dismiss is the timeliness of the appeal, appellees have set forth below for the convenience of the Court the significant dates on the left hand side of the page, and on the right hand side have described the events which took place on those dates.

April 1, 1974 — Appellants served and filed a motion pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure, asking that the judgment "be altered or amended or in the alternative that a new trial be granted."[3] Although Local Rule 11(F) of the United States District Court for the Eastern District of Virginia specifically requires that a brief accompany the motion,[4] no brief was submitted with appellants' motion. There was, however, a statement in the motion that "the Memoranda in support of this Motion will be filed within twenty-one days of the receipt of transcript of this matter." (A. 2-3) The only indication of the grounds for the motion was a statement that the motions are made "on all the grounds previously

[3] See Appendix to this Motion 2 (hereafter "A.").

[4] None of the exceptions applies to motions under Rules 52 or 59. See pp. 4-5, *supra.*

asserted in the Memoranda filed in the above matter and (1) that there remains for decision various pre-trial motions regarding evidentiary matters and (2) that the decision of the court is in conflict with the facts presented and is unnecessarily broad." (A. 2). Accompanying the motion was a letter directed to the clerk of the court requesting "that we be allowed to file our supporting brief within twenty-one days from receipt of the transcript." (A. 1). No request of the court was made to that effect, and neither the court nor the clerk ever granted the extension sought.

April 17, 1974 — The court reporter mailed a copy of the transcript to the appellants and filed the original with the court.

August 29, 1974 — Appellants served their memorandum in support of the April 1st motion (A. 4-10). That memorandum specifically excluded reliance on a claim of failure to admit relevant evidence, as appellants conceded that the transcript showed that all disputed items had been admitted (A. 5). It simply reargued the case and then sought to persuade the court to vacate its decision on account of certain advertisements which appeared subsequent to the March 21st ruling.

September 3, 1974 — Appellees served their reply which pointed out that appellants had been sent a copy of the transcript on April 17, 1974, and that by their own promise the memorandum was due on May 8, 1974, but was not filed until three and one half months later (A. 11-12). These assertions were never disputed by appellants.

October 4, 1974 — The court entered an order denying the motion of the appellants (App. 1)

November 4, 1974 — Appellants filed their notice of appeal in the district court.

It is the contention of appellees that because the notice of appeal was not filed until well beyond the 60 days authorized by 28 U.S.C. §2101(b), and because appellants took no action which effectively tolled the period for filing the notice of appeal, the appeal is not timely, and this Court lacks jurisdiction over it.

ARGUMENT

THE APPEAL IS NOT TIMELY

1. Introduction

Section 2101(b) of Title 28 requires that appeals such as this be taken by the filing of a notice of appeal within 60 days from the entry of the order being appealed. It is clear that the filing of a notice of appeal on November 4, 1974, was far beyond the 60 days allowed for appealing the order of March 21, 1974, and that therefore, unless the period for perfecting an appeal was tolled during that time, the appeal from the original order is untimely.

Section 2101(b) contains no tolling provisions such as those contained in Rule 4(a) of the Federal Rules of Appellate Procedure. However, that latter provision applies only to appeals to court of appeals, not to this Court. Appellees are unaware of any case in which the question of tolling under section 2101(b) has been raised, but we believe that there is no reason for the Court not to interpret section 2101(b) to include a tolling provision where tolling would

have occurred if the appeal had been taken to a court of appeals.[5] That result is supported by *United States v. Healey*, 376 U.S. 75 (1964), in which it was held that a timely petition for rehearing tolled the time for applying to this Court for certiorari in a criminal case, even though no rule specifically provided for such a tolling.

However, if appellants are to benefit from the tolling provisions of Rule 4(a), they must also accept the other conditions of that Rule. This includes a requirement that the tolling motions under Rules 52(b) and 59 be timely, and this condition appellants cannot meet. Although appellants served and filed within the ten days allotted a document entitled "MOTION TO AMEND FINDINGS OR JUDGMENT OR IN THE ALTERNATIVE FOR A NEW TRIAL," which cited Rules 52(b) and 59 (A. 2), the motion was so insufficient as a matter of law that it cannot constitute a timely filing for purposes of tolling the limitation on filing an appeal. The insufficiency is based on two separate factors: first, contrary to the Local Rules, a brief did not accompany the motion, and second, the grounds stated in the motion itself were so general and vague that the court could neither grant nor deny the motion until a further submission was made.[6] Since that submission

[5] This Court in *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944), ruled that a timely motion to amend findings would toll the period for taking an appeal, without addressing the question of whether the predecessor of section 2101(b) permits a tolling where none is specified in it, but is specified in other similar review provisions.

[6] The court docket reflects the fact that the panel members were sent copies of the motion when it was filed, but they took no action until the memorandum was submitted.

was not made until almost five months after the motion itself was filed, in effect, all that appellants did within the ten days was to seek an extension of time to make their motion until some indefinite time in the future. But Rule 6(b) of the Federal Rules of Civil Procedure specifically prohibits even the district court from granting an extension of time for the filing of motions under Rules 52(b) and 59, and thus it is clear that a party cannot do so on its own. Accordingly, if appellees are correct in their contention that no timely motion was filed on April 1, 1974, this appeal must be dismissed for want of jurisdiction.

2. No Timely Motion Was Filed On April 1, 1974

The first basis for our contention that appellants made no timely motion is that they did not comply with Rule 11(F) of the Eastern District of Virginia which specifically requires that a "written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies" accompany motions such as these. The appellants post-trial motion acknowledges the necessity for a memorandum (A. 2-3), as does their accompanying letter to the clerk of the court which requested a period of 21 days after the receipt of the transcript of the hearing within which to file their memorandum (A. 1). This Court need not decide whether a memorandum filed within the 21 days requested would have made the motion timely, for appellants not only failed to comply with the 21 days, but took over four and one-half months before submitting their memorandum, thereby exceeding the 10 days allowed by Rules 52(b) and 59 by nearly five months.

In addition to the requirement of Local Rule 11(F), it has been held that in a motion for a new trial grounds not

contained in a brief will not be considered by the court. *Leahy v. Travelers Ins. Co.*, 42 F.Supp. 26, 28 (S.D. Ohio 1941). The basis for such a ruling is the requirement of Rule 7(b)(1) of the Federal Rules of Civil Procedure that every motion shall "state with particularity the grounds therefor . . . ." As one court observed where a moving party failed to file a memorandum or other supporting papers:

> . . . it is not believed that this court is required to search its memory and the record in an endeavor to acquaint itself with the alleged errors in the trial of the case. *Lynn v. Smith*, 193 F.Supp. 887, 888 (W.D. Pa. 1961).

Therefore, we respectfully suggest that the failure to file an accompanying brief within the 10 days required by Rules 52(b) and 59 is a sufficient basis under these circumstances to conclude that there was no timely motion made, and hence the period for filing a notice of appeal was not tolled.

Even if this Court should conclude that a brief is not an absolute requirement, the motion itself must adequately state the grounds upon which it is to be granted, and on that basis, this motion is clearly insufficient. *Marshall's U.S. Auto Supply, Inc. v. Cashman*, 111 F.2d 140, 142 (10th Cir.), *cert. denied*, 311 U.S. 667 (1940). Appellants here simply moved on "all the grounds previously asserted," and then added the grounds that "there remains for decision various pre-trial motions regarding evidentiary matters and . . . the decision of the Court is in conflict with the facts presented and is unnecessarily broad." (A. 2). Such grounds are, in the words of the Eighth Circuit, "no more than barren

assertions", and the motion is "completely unbuttressed by the particulars required in Rule 7(b)(1), Federal Rules of Civil Procedure." *Chicago & Northwestern Ry. Co. v. Britten*, 301 F.2d 400, 402 (1962). Or as another court observed in a case in which the grounds for the post-trial motions were stated in terms analogous to those advanced here, "the general conclusions assigned as error in the motion for a new trial are vague, indefinite and lack the specificity required by Rule 7(b)(1) . . ." *Stinebower v. Scala*, 331 F.2d 366, 367 (7th Cir. 1964). In other cases the courts have held that a failure to assign the reasons for a motion within the required 10 day period is a sufficient basis to conclude that no timely motion had been made. *Fine v. Paramount Pictures, Inc.*, 181 F.2d 300 (7th Cir. 1951).[7]

In order to judge the sufficiency of the motion here, this Court might well consider the problem facing appellees, who were called upon to "respond" to the April 1st "motion", and the district court which was asked to decide it. From appellees' point of view, the motion simply said that the court was wrong for all the reasons that had not convinced the court before. Thus, there was nothing further which appellees could then have done other than to resubmit all of their prior memoranda. From the court's point of view, there was nothing it could do since there was nothing before it on which it could act. Compare *United*

[7] However, where a written statement of reasons has been provided within the 10 days allowed, the courts have permitted supplemental filings outside the 10 days to complete the reasons given. *Douglas v. Union Carbide Corp.*, 311 F.2d 182, 185 (4th Cir. 1962).

States v. Healey, supra, 376 U.S. at 80, where this Court indicated that it would be "senseless" for it to pass on an issue while a petition for rehearing is "under consideration" by the lower court. It is obvious here that there was nothing for the district court to consider because there was nothing of any substance before it. Plainly, this is not a case where the court could "comprehend the basis of the motion and deal fairly with it," in which case "technicalities ought to be avoided." *McGarr v. Hayford*, 52 F.R.D. 219, 221 (S.D. Calif. 1971). The motion here was so insufficient as not to constitute a motion at all for the purposes of tolling the time to file an appeal.[8]

One court has observed that the degree of specificity required by Rule 7(b)(1) is "by no means clear" although it found that the "courts have generally given a liberal interpretation" to it. *Harkins v. Ford Motor Co.*, 437 F.2d 276, n. 1 (3rd Cir. 1970). That court also observed that in the context of motions for a new trial the grounds must be stated "with sufficient specificity to put the opposing party on notice as to the reasons put forward for the

[8] The statement by the court in *Yanow v. Weyerhaeuser Steamship Co.*, 274 F.2d 280, 283 (9th Cir. 1959), *cert. denied*, 362 U.S. 919 (1960), to the effect that a motion under Rule 59 is still proper even if it is so defective that it cannot be granted, must be considered in light of the peculiar facts of that case. The language was part of an alternate holding needed by the Ninth Circuit to sustain a denial of an attempt by a losing party to reopen a prior decision of that court, on the grounds that the original appeal was untimely and hence jurisdictionally defective. Whether the unique circumstances of that case justify the language used to support that result is irrelevant, since the instant facts are plainly distinguishable from those in *Yanow*.

granting of a new trial." *Id.* at 277.[9] Even by such a "liberal interpretation," the motion here failed to provide the requisite notice. We submit that Rule 7(b)(1) must be given meaning and that it does not "establish a mere technical requirement," but one which can be satisfied where a reading of the motion and the papers referred to in it "can leave no doubt as to the theory upon which [the movant] is proceeding." *United States v. Krasnov*, 143 F.Supp. 184, 196 (E.D. Pa. 1956), *aff'd*, 355 U.S. 5 (1957). It is a requirement that cannot be met by general allegations, but can be satisfied by "reasonable specification" of the grounds for the motion. *United States v. 64.88 Acres of Land, etc.*, 25 F.R.D. 88, 90-91 (W.D. Pa. 1960). Judged by any of the above standards, however phrased, the motion of appellants cannot meet the requirements of Rule 7(b)(1).

It is essential that Rule 7(b)(1) be strictly enforced with regard to motions under Rules 52(b) and 59, since Rule 6(b) specifically prohibits the trial judge from extending the time to make those motions. To hold that the kind of general allegations made here satisfy those Rules, would permit a losing party to file a single sheet of paper and delay until a time of his own choosing the date for

---

[9] In 1966, Rule 59(d) was amended in respects not material to this action. The Advisory Committee Notes accompanying it discuss the requirement of particularity under Rule 7(b)(1) and conclude that it is equally applicable to all motions for new trials and that it "does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on." See 28 U.S.C.A., Rules 59-76, p. 15 (1970). The cases cited in the Advisory Committee Notes, however, do not deal precisely with the situation before this Court.

completing the motion, thereby effectively thwarting the no-extension provisions of Rule 6(b). As this Court observed in *Matten Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943):

> The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed appeal has been made . . . . Any other construction of the statute would defeat its purpose. Would-be appellants could prolong indefinitely the appeal period by making applications [contrary to the particular rules at issue there].

Or, as this Court stated in denying the government the benefit of a tolling provision in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952), the purpose of the rule is to "encourage applicants to this Court to take heed of another principle — the principle that litigation must at some definite point be brought to an end." It is apparent that the purposes enunciated in these two decisions by this Court would be violated by permitting the appellants here to prolong the period of uncertainty in the district court by failing to follow the procedural requirements for making motions under Rules 52(b) and 59. Accordingly, the Court should hold that no timely motion was made under those Rules, and hence the appeal period expired long before appellants filed their notice of appeal.

3. There Are No "Unique Circumstances" Justifying A Departure From The Rules

Rule 6(b) is clear in its statement that the time for making post-trial motions cannot be enlarged by the district court. As this Court observed in another context, ". . . the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged." *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co, supra,* 344 U.S. at 211. There are, however, decisions of this Court which have held that untimely petitions for rehearing, if considered on the merits by the court below, can reinstate the right to appeal by making a judgment not final until denial of the petition for rehearing. See *e.g., Bowman v. Loperena,* 311 U.S. 262 (1940). Those decisions, of course, antedate the Federal Rules of Civil Procedure as they now exist, in particular the no-extension provision of Rule 6(b), and hence they are no longer authority upon which appellants may rely. *Raughley v. Pennsylvania Ry. Co.,* 230 F.2d 387, 390 (3rd Cir. 1956).

Nonetheless, in spite of the clarity with which Rule 6(b) is written, this Court has permitted certain exceptions to it in what it has described as "unique circumstances." See *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 217 (1962); *Thompson v. Immigration and Naturalization Service,* 375 U.S. 384 (1964); and *Wolfsohn v. Hankin,* 376 U.S. 203 (1964). In construing these decisions, the lower courts have unanimously concluded that the element of judicial intervention — judicial misleading of the party seeking the appeal into believing that a valid extension had been granted — has been the key element. See *Lord v. Helmandaller,* 348 F.2d 780, 782 n. 3 (D.C.

Cir. 1965), *cert. denied,* 383 U.S. 928 (1966), and *Motteler v. J. A. Jones Construction Co.,* 447 F.2d 954, 955 (7th Cir. 1971) (exception applies ". . . where the late filing resulted from the litigant's reliance on a district court's erroneous grant of an extension of time within which to file a motion which, if properly filed, would terminate the running of the time for filing an appeal.") See also *Vine v. Beneficial Finance Co.,* 374 F.2d 627, 632 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967), finding an exception where a stipulation extending the time to move was entered into within the relevant time period, and the court by continuing its consideration beyond the time for appeal, was held to have retroactively approved the stipulation.

The situation here is far different because there is not the slightest indication of judicial intervention of any kind. The "mere filing in court of a motion notice for hearing in due course is not such active court involvement in misleading a party as to invoke what has been called the *Thompson-Wolfsohn* rationale." *Flint v. Howard,* 464 F.2d 1084, 1086 (1st Cir. 1972). Appellants here simply indicated in their motion that they intended to file a memorandum and made a request to the clerk for permission for late filing, a request to which they received no reply from the clerk, let alone from the court. Even the filing of a motion for an extension addressed to the court has been held to be insufficient to toll the time for taking an appeal, *Wagoner v. Fairview Consolidated School District No. 5,* 289 F.2d 480 (10th Cir.), *cert. denied,* 368 U.S. 921 (1961), and the request to a clerk is surely no stronger a case for relief.

Moreover, this is not a case like *Yanow v. Weyerhaeuser Steamship Co., supra,* 274 F.2d at 276 n. 2, where the

party who was granted an extension filed within that additional time allowed. Appellants here requested their own deadline which, although never approved, would have expired on May 8, 1974. Yet with no justification even offered, it was not until August 29, 1974, that they filed their memorandum in support of their motion. This is also not a case involving a layman where the Court might give special consideration to the status of the party seeking to appeal. See *Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965). The Attorney General of the Commonwealth of Virginia, who frequently represents clients in both the United States District Court for the Eastern District of Virginia and this Court, is and has been counsel to appellants from the start. There is simply no reason here to abandon the procedural requirements of the Rules, and accordingly because this Court lacks jurisdiction of this appeal, *United States v. Robinson*, 361 U.S. 220, 229 (1960), it must be dismissed.

CONCLUSION

For the foregoing reasons the appeal of the appellants should be dismissed.

Respectfully submitted,

ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorney for Appellees

RAYMOND T. BONNER
433 Turk Street
San Francisco, Calif. 94102
(415) 441-4771
Of Counsel

February 21, 1975

APPENDIX

COMMONWEALTH OF VIRGINIA
[Seal]
OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 East Broad Street
Richmond, Virginia 23219
804-770-2071

April 1, 1974

The Honorable W. Farley Powers, Jr.
Clerk, U.S. District Court
Eastern District of Virginia
Post Office Building
10th and Main Streets
Richmond, Virginia 23219

Re: Virginia Citizens Consumer Council, Inc., et al.
v. State Board of Pharmacy, et al.
Civil Action No. 73-336-R

Dear Mr. Powers:

Enclosed herein is a Motion which I would appreciate your presenting to the Court and filing accordingly. I have spoken with opposing counsel and though we could not agree on a time for filing a Memoranda, it is requested that we be allowed to file our supporting brief within twenty-one days from receipt of the transcript. I am, by copy of this letter, requesting Mr. Gilbert Halasz to provide the transcript portion concerning the pre-trial motions.

Thank you for your cooperation.

Sincerely,
/s/ Anthony F. Troy
Anthony F. Troy
Deputy Attorney General

AFT:gt
Enclosures
cc: Mr. Gilbert Halasz
Court Reporter
Post Office Building
10th and Main Streets
Richmond, Virginia 23219

Raymond T. Bonner, Esquire

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO, Lynn B. Jordan, Plaintiffs,	)	
v.	)	Civil Action No. 73-336-R
State Board of Pharmacy, Thomas F. Marshall, Jr., Charles F. Kingery, Wallace B. Thacker, Linwood S. Leavitt, William R. Maynard, Jr., Defendants.	)	

MOTION TO AMEND FINDINGS OR JUDGMENT OR IN THE ALTERNATIVE FOR A NEW TRIAL

The defendants, Virginia State Board of Pharmacy, *et al.*, move the Court pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure that the judgment in the above-captioned matter, entered on March 21, 1974, be altered or amended or in the alternative that a new trial be granted. Such motions are made on all the grounds previously asserted in the Memoranda filed in the above matter and (1) that there remains for decision various pre-trial motions regarding evidentiary matters and (2) that the decision of the Court is in conflict with the facts presented and is unnecessarily broad. The Memoranda in

support of this Motion will be filed within twenty-one days from the receipt of transcript of this matter.

STATE BOARD OF PHARMACY, THOMAS F. MARSHALL, JR., CHARLES F. KINGERY, WALLACE B. THACKER, LINWOOD S. LEAVITT AND WILLIAM R. MAYNARD, JR.

By: /s/ Anthony F. Troy
Counsel

Andrew P. Miller
Attorney General of Virginia

Anthony F. Troy
Deputy Attorney General

D. Patrick Lacy, Jr.
Walter L. Penn, III
Assistant Attorneys General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond, Virginia

Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO, Lynn B. Jordan,

Plaintiffs,

v.

Civil Action No. 73-336-R

State Board of Pharmacy, Thomas F. Marshall, Jr., Charles F. Kingery, Wallace B. Thacker, Linwood S. Leavitt, William R. Maynard, Jr.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO AMEND FINDINGS OR JUDGMENT OR; IN ALTERNATIVE, FOR A NEW TRIAL

In its opinion entered herein on March 21, 1974, this Court stated that the sole issue in this case was "whether the State may legally exclude from publication prescription drug prices *not otherwise fairly available* to those consumers who vitally need the drugs, . . ." Opinion, p. 6. Working from the factual conclusion stated in the issue, the Court struck down the Virginia statute prohibiting the advertisement of prescription drugs on the basis that the statute violated the consumers' "right-to-know" protected by the First Amendment. In so doing, the Court refused to ascribe any infirmity to the decision of the three-judge court in *Patterson Drug Co. v. Kingery*, 306 F. Supp. 821 (W.D. Va. 1969) which upheld the

constitutionality of the identical statute against a First Amendment attack.

The defendants have filed a motion, pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure, requesting that the judgment entered herein be altered or amended or, in the alternative, that a new trial be granted on the basis that (1) there remains for decision various pre-trial motions regarding evidentiary matters and (2) the decision is in-conflict with the facts and is unnecessarily broad.

Since filing the aforesaid motion, the defendants have received and studied the transcript of the proceedings herein held on December 18, 1973. It is clear from the transcript (page 11) that the matters sought to be introduced by the defendants have been admitted into evidence by the Court. There is no need, therefore, to discuss at this time the first ground supporting this motion. The defendants respectfully submit, however, that the admission of that evidence bolsters the second basis of the instant motion.

As stated above, this Court's statement of the issue in this case assumed that prescription drug price information is not now available to the public and will not be available unless pharmacists are permitted to advertise such information. It is submitted that this assumption, on which the Court's opinion is entirely bottomed, has no factual support in the record. On the contrary, the evidence before this Court clearly shows that drug price information is easily accessible to the consumer. Any individual may obtain such information by merely calling or going by the pharmacy and requesting it.

it is patently obvious that this Court's decision has not had the least salutory effect on consumers. Advertisements which have appeared subsequent to the decision have not quoted prices. They merely set forth an invitation for consumers to call and get price or discount information, the very thing permitted by the statute prior to the decision. See Appendix A. Thus, not only is the record bankrupt of support for this Court's factual assumption, but the assumption is also contradicted by the practice.

In addition to the fact that price information is easily available to the consumer, the Court's decision completely overlooks the reasons why advertising should be prohibited, all of which are amply supported by the evidence. The pharmacists' role cannot be said to be narrowly limited to the sterile act of filling a prescription. As the record adequately demonstrates, the pharmacist, as a professional, acts as a monitor to ensure that a patient is not taking drugs prescribed by different doctors which, while taken separately have beneficial effects, when taken together might have harmful effects on the patient. Only pharmacists can perform this integral and necessary function since many times doctors may be unaware of other medication being taken by the individual. This Court's decision will have the direct effect of causing consumers to be deprived of this invaluable "benefit to the public", *Patterson, supra*, at 824, by allowing pharmacists to lure them into their pharmacy by means of "loss leaders" and other gimmicks calculated not to aid the patient, but to increase profits.

Even if there exists a constitutionally protected "right-to-know", a right which the defendants earnestly contend does not exist, there is no constitutionally protected right to receive information in any particular form, much less in

the form of an advertisement. Thus, by holding that only dissemination of prescription drug prices through the medium of advertising will fairly meet the "right-to-know," the scope of this Court's order is far too broad. The means of dissemination of information recognized by this Court to be available under the statute in question adequately meets any "right-to-know" test and provides ample support for a finding by this Court that the statute is constitutional.

STATE BOARD OF PHARMACY, THOMAS F. MARSHALL, JR., CHARLES F. KINGERY, WALLACE B. THACKER, LINWOOD S. LEAVITT AND WILLIAM R. MAYNARD, JR.

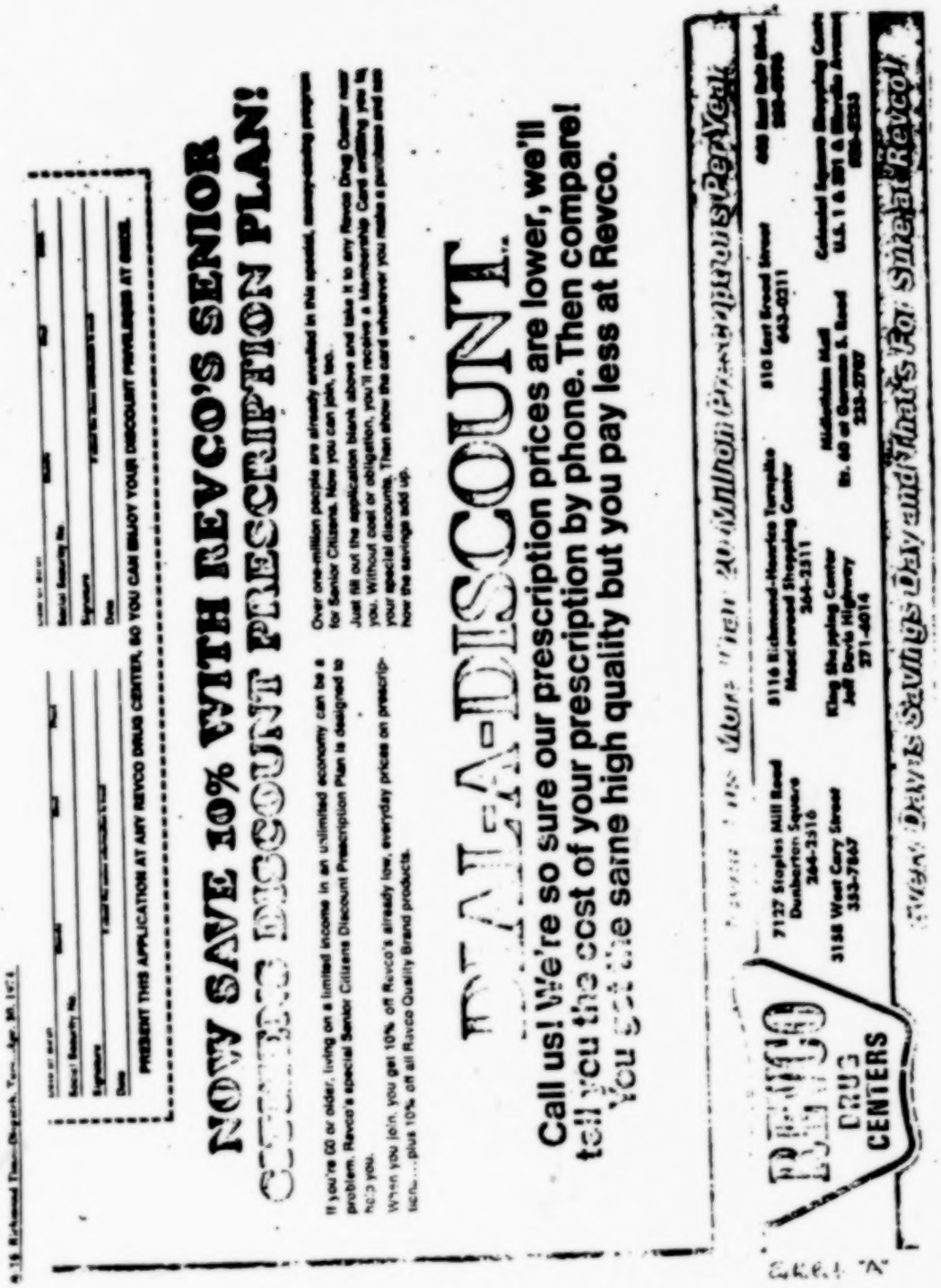
By: /s/ Anthony F. Troy
Counsel

Andrew P. Miller
Attorney General

Anthony F. Troy
Deputy Attorney General

D. Patrick Lacy, Jr.
Walter L. Penn, III
Assistant Attorneys General
1101 East Broad Street
Richmond, Virginia 23219

[EXHIBIT "A"]



[EXHIBIT "B"]

BEST COPY AVAILABLE

[EXHIBIT "C"]

A-22 Richmond Times-Dispatch, Sun., May 19, 1974

ɔaign Purse Overflowing

of Bumpers' support comes from local Arkansans, despite the continuing rumors that the Eastern Jewish community has offered to contribute money to Bumpers. Fulbright has been unpopular with some Jewish groups because of what they consider his lack of support for Israel in the Middle Eastern controversy.

Bumpers, according to sources close to his campaign, deliberately set a $1,000 limit on individual contributions and insisted that he be informed of all out-of-state contributions. The sources said Bumpers' campaign would be harmed if he received widespread out-of-state Jewish support.

YES, THE LAW HAS CHANGED; BUT WE HAVEN'T!

Now we can advertise low Rx prices (most of which would not be the same type, strength, or quantity of medication that your doctor would prescribe for you).

We could encourage you to phone our pharmacy to have your Rx priced prior to bringing it to us, but most people can't properly read their prescritions (and we have always quoted our low prices to those who can when they call).

We can now advertise our additional 10% discounts for all senior citizens (60 years old), which we have had since October, 1972; but everybody who's anybody in the Rx business has that.

What we can't advertise emphatically enough is the fact that we want your prescription business because we want to serve you to the best of our abilities: We want to carry out your doctor's orders and dispense your medication at the lowest possible price; We want to provide you with all of the professional services that you have grown to expect from a pharmacy.

Let us fill your next prescription and we will do our best to save your time, money, and faithful friendship.

The Prescription Center

SATURDAY...OPEN MEMORIAL DAY!

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., *et al.*, Plaintiffs,	)	Civil Action
v.	)	No. 73-336-R
STATE BOARD OF PHARMACY, *et al.*, Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO AMEND FINDINGS OR IN ALTERNATIVE FOR A NEW TRIAL

Plaintiffs oppose defendants' motion to amend the findings or in the alternative for a new trial on the grounds that (1) the motion has not been filed within the time required by the Federal Rules of Civil Procedure and (2) there is no legal support for said motion, the primary basis for which being the defendants' disagreement with this Court's decision.

Rules 52 and 59 of the Federal Rules of Civil Procedure both require that motions made pursuant thereto *shall* be served within 10 days after the entry of judgment. Defendants attempted to comply with this 10-day requirement by filing the notice of their motion within such time, but their motion was incomplete for it was not accompanied by any supporting memoranda. Instead of filing such memoranda they requested the Court to permit them to file the same within 21 days after receiving the transcript.

Not only did the Court not grant this request, but it is plaintiffs' understanding that defendants received the transcript on April 17, 1974. Thus, not only have defendants not complied with the Rules, but they have also not fulfilled their representation to this Court, and, now, more than 5 months after the Court's decision are making their motions. There is simply no basis for allowing defendants to file their motion at this time, and there are obvious reasons for requiring attorneys to comply with the rules.

Even if there were some provision for allowing the late filing of this motion there is no substantive justification for its being granted. Defendants no longer base their motion on the Court's supposedly having improperly excluded some evidence. The basis of their motion is simply that the facts do not support the Court's decision. In essence their motion is that they disagree with the Court. If defendants thought the Court's decision was not supported by the facts, they should have appealed to the United States Supreme Court, which they have not done within the time required. 28 U.S.C. §2101(b).

Finally, defendants ask this Court to reconsider its decision because of events *subsequent* to the trial. Not only are these subsequent events obviously irrelevant, but they do not support defendants' position that advertising has not aided the consumer. For example, all of the ads which defendants attached to their motion tell persons over 60 years of age that they are entitled to 10% discounts. This obviously vital information could not have been disseminated prior to this Court's ruling that §54.-524.35(3) of the Code of Virginia is unconstitutional.

Plaintiffs respectfully submit that defendants' motion must be denied.

Respectfully submitted,

/s/ James W. Benton, Jr.

James W. Benton, Jr.

Hill, Tucker & Marsh
214 East Clay
Richmond, Virginia 23219
(804) 648-9073

/s/ Raymond T. Bonner

Raymond T. Bonner

2000 P Street NW
Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Plaintiffs

[Certificate of Service]

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In The

Supreme Court of the United States

October Term, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, ET AL.,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL.,
Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
ROBERT P. KYLE
Assistant Attorneys General

Supreme Court–State Library Building
1101 East Broad Street
Richmond, Virginia 23219

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ARGUMENT

The question raised by this appeal is whether there is a First Amendment "right to know" granting consumers a paramount right which invalidates prohibitions against advertising not only in the profession of pharmacy but in any of the professions.[1] This appeal by the Virginia State

[1] The statute invalidated in the instant case involved the profession of pharmacy. The fact that pharmacy is a profession affecting health and safety, *Patterson Drug Co.* v. *Kingery*, 305 F.Supp. 821 (3 Judge Ct., W.D. Va. 1969) was never contested. In fact, in the lower court, Appellees abandoned their Fourteenth Amendment claim that the statute had no relationship to the health and safety of the consumer. The First Amendment principle enunciated by the lower court is now being used to invalidate advertising prohibitions in other professions. *Public Citizens Health Research Group, et al.* v. *Commission on Medical Discipline of Maryland*, C.A. No. B74-56, U.S.D.C. Dist. of Md. See also *Consumer's Union, et al.* v. *American Bar Association and the Virginia Bar Association*, C.A. No. 75-0105-R, U.S.D.C., E.D. of Va., filed on February 27, 1975, attacking the prohibition against advertising attorneys' fees.

Board of Pharmacy raises a question that is conceded by Appellees (1) to be "substantial," (2) to meet "the requirements for plenary consideration by this Court" and (3) which is not properly subject to a motion to affirm.

Notwithstanding the conceded merits of the substantive issue presented, Appellees would have this Court dismiss the appeal because a motion made pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure to amend finding or for a new trial was not accompanied by a brief in accord with Rule 11(F) of the Local Rules of the United States District Court for the Eastern District of Virginia.[2]

The short answer to Appellees is that a motion for a new trial, regardless how they would substantively characterize it, was timely filed. The time for appeal was, therefore, tolled. The subsequent filing of a brief had no effect whatsoever on the efficacy of the motion nor therefore the time for appeal.[3]

---

[2] Local Rule 11(F) is discretionary with the lower court and provides:

> "All motions, unless otherwise directed by the Court, except motions for (1) a more definite statement, (2) an extension of time to respond, unless the time has already expired, (3) production of documents, (4) compelling answers to interrogatories, (5) default judgment, (6) objections to interrogatories, and (7) motions relating solely to processes of discovery, shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies. The opposing party shall file his response, including a like brief and such supporting documents as are then available, within ten days thereafter. For good cause, the responding party may be given additional time or may be required to file his response, brief and supporting documents within such shorter period of time as the Court may specify."

[3] The subsequent filing of the brief is analogous to serving affidavits under Rule 59(c). The time periods when such affidavits must be filed are not within the prohibition of enlarging time periods as stated in Rule 6(b).

Appellee's present challenge to the timeliness of the Brief in Support of the Motion to Amend Findings or Judgment or in the Alternative for a New Trial was presented to and considered by the trial court which found it without merit. District Courts are authorized by Rule 83 to promulgate rules of procedure not inconsistent with the Federal Rules. Such courts have great discretion in applying their rules. *Lance, Inc.* v. *Dewco Services, Inc.*, 442 F.2d 778 (9th Cir. 1970); *U.S.* v. *Simmons*, 476 F.2d 33 (9th Cir. 1973). Indeed, where the interests of justice require, a court may waive its own rules. *Moore* v. *American Export Isbrandtsen, Inc.*, 56 FRD 565 (S.D. N.Y. 1972). Absent a showing of substantial prejudice, this action is not reviewable. *American Farm Line* v. *Black Ball Freight Service*, 397 U.S. 532, 90 S.Ct. 1288, 20 L.Ed.2d 547 (1969). As indicated, Appellees have not alleged, much less shown, any prejudice. Appellees' novel suggestion, that a motion never becomes a motion until joined with the brief, has never been, to Appellants' knowledge, accepted by any court. Indeed, where similar situations have arisen, the courts have proceeded to rule on the motion on the basis of that document itself, depriving the errant party of the opportunity to present a more developed argument. *Fort* v. *Daley*, 431 F.2d 1128 (7th Cir. 1970); *Woodham* v. *American Cystoscope Co.*, 335 F.2d 551 (5th Cir. 1964).

Moreover, it is standard practice in the Eastern District of Virginia, if a motion under Rules 52 and 59 is filed, to subsequently file a brief. Many times, the transcript of the trial must be examined, and this seldom can be transmitted to counsel within ten days.

Appellees also now assert that the motion lacks the requisite particularity under Rule 7(b)(1). Appellees then leap to the conclusion that if the motion lacks particularity, it cannot have been timely. In Appellants' opinion, such

bootstrapping would be illogical even if the motion were defective. The fact that the motion was filed tolls the time for appeal even if it is subsequently determined that the motion is fatally defective. *Leishman* v. *Associated Electric Wholesale Co.*, 318 U.S. 203 (1943). *Cf. Steinbower* v. *Scala*, 331 F.2d 366 (7th Cir. 1964).

In summary, once the motion was filed on April 1, 1974, all parties knew the case was still pending. Had Appellees wanted to accelerate the Court's disposition of the motion, they should have filed their response to the motion. That they did not, indicates that they concurred with the status of the case as pending. The motion was acted upon by the lower court and a timely appeal to this Court was noted. For the reasons previously stated, this Court should note probable jurisdiction and grant plenary consideration of the question presented.

Respectfully submitted,

VIRGINIA STATE BOARD OF PHARMACY, ET AL.

By

Counsel

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
ROBERT P. KYLE
Assistant Attorneys General

Supreme Court–State Library Building
1101 East Broad Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Anthony F. Troy, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Virginia State Board of Pharmacy in the above-captioned matter, hereby certify that three (3) copies of this Appellants' Brief in Opposition to Motion to Dismiss have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 4th day of March, 1975, as follows:

James W. Benton, Jr., Esquire
Hill, Tucker and Marsh
214 East Clay Street
Richmond, Virginia 23219

Raymond T. Bonner, Esquire
Allan B. Morrison, Esquire
Suite 515
2000 P Street, N.W.
Washington, D. C. 20036

Attorneys for Appellees

All persons required to be served have been served.

ANTHONY F. TROY
Deputy Attorney General

Supreme Court, U. S.
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In The

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October Term, 1974

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Appeal from the United States District Court
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BRIEF OF APPELLANTS

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Chief Deputy Attorney General

D. PATRICK LACY, JR.
Deputy Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

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COUNCIL, INC., ET AL.,
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Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLANTS

OPINION BELOW

The opinion and order of the three-judge District Court is reported at 373 F. Supp. 683. That opinion and order, as well as the order denying the motion of appellants to amend the findings or judgment, or in the alternative for a new trial is set forth in the Appendix to the Jurisdictional Statement, App. 1 through App. 9.[1]

[1] The appendices in the Jurisdictional Statement and Motion to Dismiss, have not been reproduced again. References to those appendices will be made accordingly. Reference to the joint appendix, prepared pursuant to Rule 36 will be cited J.A. .....

JURISDICTION

This Court has jurisdiction over the instant appeal as provided for by 28 U.S.C. § 1253 (1948).

The opinion and order of the court below was filed on March 21, 1974. The order of the court denying the motion of appellants to amend findings or judgment, or in the alternative for a new trial, was entered on October 4, 1974. Notice of appeal was filed on November 4, 1974. Probable jurisdiction was noted by this Court on March 17, 1975.

STATUTE INVOLVED

This appeal involves the validity of Virginia Code Annotated § 54-524.35(3) (1974) which deems pharmacists guilty of unprofessional conduct if they advertize prescription drugs in a certain manner.

The statute involved provides:

> *"When pharmacist considered guilty of unprofessional conduct.*—Any pharmacist shall be considered guilty of unprofessional conduct who * * *
>
> (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

QUESTION PRESENTED

Whether the First Amendment grants consumers an independent "right-to-know" thus allowing invalidation of a statute which validly prohibits the ~~desimination~~ dissemination of commercial advertising.

STATEMENT OF THE CASE

In 1968 the Virginia General Assembly declared that a pharmacist would be guilty of unprofessional conduct if he published, advertised or promoted the price or discount terms for prescription drugs. 1968 Acts of Assembly, Chapter 803. The statute immediately came under attack by a pharmacy contending that the statute violated First and Fourteenth Amendment rights. Both contentions were rejected. *See Patterson Drug Co.* v. *Kingery,* 305 F. Supp. 821 (W.D. Va. 1969) (three-judge court).

On July 1, 1973, the Appellees, Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO and Lynn B. Jordan, instituted an identical challenge in the United States District Court for the Eastern District of Virginia. The Appellees sought an injunction against the enforcement by the Appellants of Va. Code Ann. § 54-524.35(3) which declares the publishing, advertising, or promotion of prices, fees discounts, rebates or credit terms for prescription drugs to be unprofessional conduct subjecting offending pharmacists to possible disciplinary sanctions. While recognizing that the State may prohibit the advertising of prescription drug prices by pharmacists, *Patterson Drug Co.* v. *Kingery, supra,* the District Court enjoined the enforcement of the statute as violative of the consumers' "right-to-know."

Section 54-524.35 (3) in no way subjects the Appellee or any persons they purport to represent to the jurisdiction of the Appellants. It does subject pharmacists, licensed by the State Board of Pharmacy, to disciplinary action, although no such action has been taken. In addition, it has never been claimed, nor have the Appellants indicated in any way, that price information may not be disseminated or otherwise be made available to the public by other methods such as in response to telephonic or oral requests.

While statistics reflect a disparity in the price of prescription drugs between individual pharmacies and, indeed, between different pharmacies in the same chain of pharmacies, there is no evidence in the record that the inability to advertise prescription drug prices results in higher prices to the consumer. It was stipulated in the court below that there is at least as great a disparity in the prices of nonprescription drugs which are freely advertised and promoted.

It was also stipulated that pharmacy is a profession which requires its practitioners to have five years of university level training, one year's practical training and the successful completion of an examination prior to licensure. Va. Code Ann. §§ 54-524.2(a) and 54-524.21.

ARGUMENT

Prohibiting The Commercial Dissemination Of Prescription Drug Price Information Does Not Violate Any First Amendment Rights Of Consumers.

A.

The Prohibition Of Price Advertising Is A Valid Exercise Of States' Rights To Regulate A Health Profession.

This is a First Amendment case. It is not a Fourteenth Amendment case. In light of this Court's decision in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) appellees are estopped from arguing that the statute bears no relationship to public health and safety. The evidence introduced in the lower court demonstrated a relationship between the challenged statute

and the protection of the public health, safety and welfare.[2] As stated by the court in *Patterson,* 305 F. Supp. at 824-25:

> "Pharmacists must have extensive knowledge of a wide range of drugs. Accuracy is essential; mistakes can be serious. A few prescriptions, but nevertheless a significant number, cannot be filled from drugs available in manufactured form, so the medicine must be compounded by the pharmacists. Some pharmacists, probably a minority, systematically monitor prescriptions by family records to avoid allergic reactions or the simultaneous use of antagonistic drugs, of which the patient's doctor may not be aware. Although monitoring is not completely effective because of the mobility of customers and the availability of nonprescription drugs which may be antagonistic, it is a benefit to the public.
>
> "From the evidence we find that dispensing prescription drugs affects the public health, safety and welfare. And we conclude that the state's classification and regulation of pharmacy as a professional practice is not arbitrary or invidious."

No infirmity to that opinion was escribed by the lower court, 372 F. Supp. at 685. And whether the anticompetitive effect of the ban on advertising outweighs the classification

---

[2] Appellants introduced into evidence exhibits and testimony of pharmacists, doctors and leading scholars in pharmacology demonstrating 1) the important role a pharmacist has in the medical health field and 2) how such role safeguards the public taking antagonistic drugs, especially with the utilization of patient profile records. Family prescription or patient profile records generally are kept alphabetically by family name. The record reflects the drugs being taken by each member of the family unit. Also included are known sensitivities to drugs, and any other information that might affect the healh of the individual by consuming drugs. With this information in one place the pharmacist, at a glance, is able to evaluate whether a particular drug should be given without further inquiry of the physician or the patient. Obviously, the system breaks down and becomes useless when the patient uses many different pharmacies. See for example proposed testimony of Wallace B. Thacker, J.A. 29-30; Thomas E. Rorrer, J.A. 31-32 and Dr. Harold I. Nemuth, J.A. 32-35.

and regulation of pharmacy as a profession[3] is a legislative choice, not judicial. To emphasize, some believe, as do appellees, that removing the ban on advertising prescription drug prices would induce retailer incentive for price competition and will assist consumers in a decision regarding where to purchase medication. Others feel that there in fact is a need for strict regulation of all aspects of pharmacy, including advertisement of price. As the *Patterson* court held, however, 305 F. Supp. at 826 the judiciary is "not empowered to determine whether the statute is wise or foolish, economically sound or improvident." The "two opposed views of public policy are considerations for the legislative

[3] The Virginia statutory scheme strictly regulates the dispensing of drugs. See for example:

§ 54-524.2(a)

"The practice of pharmacy in the State of Virginia is declared a professional practice affecting the public health, safety and welfare and is subject to regulation and control in the public interest."

* * *

§ 54-524.2(b)
(26a)

" 'Practice of pharmacy' is the personal health service that is concerned with the art and science of procuring, recommending, administering, preparing, compounding and dispensing of drugs, medicines and devices used in the diagnosis, treatment, or prevention of disease, whether compounded or dispensed on a prescription or otherwise legally dispensed or sold, and shall include the proper and safe storage and distribution of drugs, the maintenance of proper records therefor, and the responsibility of poviding information, as required, concerning such drugs and medicines and their therapeutic values and uses in the treatment and prevention of disease.

The words 'drug' and 'devices' as used in this definition, shall not include surgical or dental instruments, physical therapy equipment, X-rays apparatus, their component parts or accessories.

The 'practice of pharmacy' shall not include the operations of a manufacturer or wholesaler."

* * *

choice." *North Dakota Pharmacy Board* v. *Snyders Stores,* 414 U.S. at 167; *Dean* v. *Gadsen Times,* 412 U.S. 543 (1973).

B.

COMMERCIAL ADVERTISEMENT OF DRUGS IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION.

It is conceded, as it must be, "that speech is not rendered commercial by the mere fact that it relates to an advertise-

§ 54-524.16

"The Board shall regulate the practice of pharmacy and the manufacturing, dispensing, selling, distributing, processing, compounding, or other disposal of drugs, cosmetics and devices, control the character and standard of all drugs, cosmetics and devices within the State, investigate all complaints as to the quality and strength of all drugs, cosmetics, and devices and take such action as may be necessary to prevent the manufacturing, dispensing, selling, distributing, processing, compounding and other disposal of such drugs, cosmetics and devices as do not conform to the requirement of law and in so regulating the Board shall consider any of the following criteria as they are applicable:

* * *

(d) Maintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citzens of Virginia.

(e) The maintenance of complete records of the nature, quantity or quality of drugs or substances distributed or dispensed, of all transactions involving controlled substances or drugs so as to provide adequate information to the patient, the practitioner or the Board."

§ 54-524.50

"No person shall, in the course of his normal activities and pursuant to solicitation, dispense a prescription under any plan, arrangement, or practice which does not provide for a bona fide physician-pharmacist-patient relationship. The physician-pharmacist-patient relationship is that situation which permits either the physician, pharmacist, or patient to inquire concerning factors relating to the prescription and which permits the physician and pharmacist to render such other professional services as required for protection of the health and welfare of the patient."

ment," *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 384 (1973), or by the fact that a newspaper is compensated for publishing the advertisement. *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964). The crucial factor in determining the nature of an advertisement is whether it does no more than propose a commercial transaction. *Pittsburgh Press, supra,* at 385. As evidenced in the Appendix to appellee's Motion to Dismiss, A. 8 to A. 10, the advertisements herein are purely commercial. Phrases such as "dial-a-discount," "compare," "save," "pay less," "10% senior citizens discount," "full service pharmacy," "over 150 million prescriptions filled," and many others of such ilk, do not begin to rise to the dignity of "social, political, aesthetic, moral, and other ideas and experiences," *Kleindienst* v. *Mandel,* 408 U.S. 753, 763 (1972), traditionally granted First Amendment protection. The advertisements in the instant case do no more than propose a commercial transaction, the sale of drugs. The ads simply seek to induce consumers into purchasing the services offered.[4] (Compare page A. 10 of appellees' Motion to Dismiss which at least makes a pretext of commenting on the wisdom of the statute prohibiting advertising.) This court made it clear in *Pittsburgh Press, supra,* that First Amendment protection will not be afforded purely commercial advertising. See also *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). State regulation of such advertisements is permissible, especially where the advertisements relate to the medical-health field. *Williamson* v. *Lee Optical Co., Inc.,* 348 U.S. 483 (1955); *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935). As the record amply shows the advertisement under scrutiny here

[4] The Federal Trade Commission, while changing its policy regarding "image" ads that are deceptive, nonetheless still exercises strict regulatory power over "ads that might have a commercial effect." *See* Antitrust & Trade Regulation Report, 712 ATRR at A-4 (May 6, 1975).

is of a purely commerciadl nature and thus is subject to the valid regulatory scheme embodied in § 54-524.35(3), Va. Code Ann.

Initially in this connection, the decision of the court below, is inconsistent with the *Valentine* v. *Chrestensen, Williamson* v. *Lee Optical* and *Semler* v. *Dental Examiners* decisions of this Court. It is also in diametric opposition to the decision of the three-judge District Court for the Western District of Virginia in *Patterson Drug Co.* v. *Kingery,* which upheld, against First and Fourteenth Amendment attack, the identical statutory provision attacked in the court below and to which the court below, as indicated, expressly refused to ascribe any infirmity. In addition, the decision of the court below enunciated and entirely novel principle of constitutional law, which is not only without decisional support, but is also squarely in contravention of the controlling principles approved by this Court in *Valentine, Semler* and *Williamson.*

The Commonwealth of Virginia has found "The practice of pharmacy . . . [to be] a professional practice affecting the public health, safety and welfare and . . . subject to regulation and control in public interest," Va. Code Ann, § 54-524.2(a), and it was so stipulated by the parties. The statutory provision under scrutiny merely prohibts individuals who undertake the profession from advertising the prices they charge for prescription drugs. Such advertisements, of course, clearly do no more than propose a commercial transaction—the sale of drugs. Because it is a classic example of commercial speech, *Pittsburgh Press* it is unprotected by the First Amendment. *Valentine* v. *Chrestensen, supra.* In striking down the advertising proscription of §54-524.35(3), the district court's opinion is at war with the principals enunciated by this Court in *Valentine* that the First Amendment does not protect purely commercial advertising.

Because we are dealing here with pure commercial speech unprotected by the First Amendment, the question becomes whether the advertising proscription bears some rational relationship to a legitimate state end. *McDonald* v. *Board of Election Com'rs.*, 394 U.S. 802 (1969). Clearly, the authority to act in the interest of public health, which is at the very core of the police power of a state, supports the statute in question. The decision of the court below, however, eschews this authority.

First in *Semler* and again in *Williamson* this Court upheld statutes prohibiting advertising in the health field as a valid exercise of the state's authority to protect the public health, safety and welfare. While recognizing the continuing validity of those decisions, the court below erroneously held that the statutes involved in those decisions differed from that under scrutiny here:

> "We do not find adversely dispositive of the issue here Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963), Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935) or Williamson v. Lee Optical Co., 348 U.S. 483 (1955). State statutes there approved condemned generally advertisements of the door-to-door sale of eyeglasses with guarantees of satisfaction; advertisements of professional superiority of certain dentists and the carrying of their fees; and advertisements "soliciting" the sale of eyeglasses and frames by "baiting "and "enticing" the public into buying them.
>
> Clearly these publications were ex facie suppressible under State police powers and the interdicting statutes unquestionable. Just as clearly, however, the Virginia statute in suit is not of this ilk. It excludes an advertisement of a named drug which has been written into an authetic prescription issued to a patient individually by his doctor to be filled only by a licensed pharmacist. The laws sustained in *Head, Semler* and *Williamson* surely did not encompass prescription holders like the claimants in this suit."

The district court's failure to apply the principles of *Semler* and *Williamson* was improper, however. The statute under attack in *Semler* prohibited *inter alia* the advertising of prices for professional services 294 U.S. at 609. In *Williamson* the statute made it unlawful "to solicit the sale of frames, mountings . . . or any other optical appliances." 348 U.S. at 489. The statute in question here prohibits advertisements of prescription drug prices. Clearly, there is no legally significant difference between the statutes upheld in *Semler* and *Williamson* and the statute here.

Furthermore, the district court's attempt to distinguish *Semler* and *Williamson* on the grounds that this statute deals with prescription drugs filled by licensed pharmacists is utterly without merit. I*n Semler,* the statute was directed against licensed dentists. In *Williamson* the statute was directed against licensed opticians who had to follow the prescriptions of ophthalmologists or optometrists; a situation identical to that of pharmacists dispensing prescription drugs. In short, there is no difference between the *Semler* and *Williamson* cases and this case other than the crucial fact that the district court here refused to follow those cases.

And as indicated, there is a substantial relationship between the challenged statute and the protection of the public health, safety and welfare. *See Patterson,* 305 F. Supp. at 824-25.

In sum, then, the Court is not confronted in this case with the traditional role of the press of disseminating information and communicating opinion. See *New York Times* v. *Sullivan, supra,* at 266. The advertisements do not express a position whether, as a matter of social policy, drugs should be advertised, nor do they criticize the statute or its enforcement. The advertisements here do not even

remotely resemble the advertisement in *New York Times* v. *Sullivan*. Quite simply, they do no more than propose a commercial transaction. And this is all that consumers request, price competition through the removal of the ban on advertising. Thus, the advertisements are "classic examples of commercial speech," *Pittsburgh Press, supra,* at 385, which is in no way stripped of its commercial nature by editorial judgment. *Capitol Broadcasting Co.* v. *Acting Attorney General,* 333 F.Supp. 582 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972). As pure commercial speech, it is subject to regulation by the Commonwealth. *Pittsburgh Press, supra; Valentine* v. *Chrestensen, supra.* Cases such as *Capitol Broadcasting, New York State Broadcasters Ass'n.* v. *United States,* 414 F.2d 990 (2nd Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970), and *Banzhaf* v. *F.C.C.,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom., Tobacco Institute, Inc.* v. *F.C.C.,* 396 U.S. 842 (1969), are also significant in their recognition that advertising can be regulated although the activity sought to be advertised is legal. See also *Valentine* v. *Chrestensen, supra.*

See also this Court's decision in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, (1974) holding that a city's decision, "as part of [a] commercial venture" to limit advertising card space to commercial and service oriented advertising, to the exclusion of issue-oriented advertisements did not "rise to the dignity of a First Amendment violation." 418 U.S. at 303-304.

C.

SINCE THERE IS NO RIGHT TO COMMERCIALLY ADVERTISE, CONSUMERS HAVE NO CORRELATIVE "RIGHT TO KNOW."

The opinion of the court below is in irreconcilable conflict with the decision of the three-judge district court in *Patterson.* In *Patterson* the court had before it the identical

advertising proscription. As here, the statute was being subjected to First Amendment attack. Unlike the court here, however, the court in *Patterson* correctly found no violation of First Amendment rights and upheld the enforceability of the statute.

The court below expressly refused to reject the holding in *Patterson:*

> "Validity of the Virginia law, say the defendants, is secured in the able opinion of *Patterson Drug Company* v. *Kingery,* 306 F. Supp. 821 (3-judge court, W.D. Va. 1969). No infirmity is now ascribed to that decision, but notably there the suit was cast in a context quite the opposite of that pleaded here. In *Kingery,* the unsuccessful assailants were pharmacists, sellers of the drugs and, of course, theirs was a prima facie commercial approach. The opinion mentions the First Amendment only to note its inapplicability because the case involved commercial advertising. Consumers' consequences, though, understandably were not discussed since they were not raised." 373 F. Supp. at 685-686.

The lower court's attempted distinction of the *Patterson* case, however, is without merit. First, as indicated, the advertising proscription under attack in *Patterson* was identical to that under attack in this case. The *Patterson* court upheld the proscription against First and Fourteenth Amendments attack, a holding with which the court below was in agreement. The court below attempted to distinguish the cases on the basis that *Patterson* was brought by pharmacists while the instant litigation was instituted by consumers. This is, indeed, a distinction without a difference. If the proscription did not violate First Amendment rights in *Patterson,* it cannot do so now. If the proscription was a lawful exercise of the State's police power in *Patterson,* it can be no less here.

Second, the court below stated that the *Patterson* court did not discuss the plight of consumers. This is erroneous. The *Patterson* court correctly recognized that it was not sitting as a superlegislature. As stated by that court:

> "We have not overlooked the anticompetitive effect of the ban on advertising.
>
> However, we are not empowered to determine whether the statute is wise or foolish, economically sound or improvident. Decision of these issues lies with the state legislature. Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963)." *Patterson, supra,* at 825-26.

In *Kleindienst* v. *Mandel, supra,* 408 U.S. at 762 this Court recognized that it has referred to a "First Amendment right to 'receive information and ideas.' "

"It is now well established that the Constitution protects the right to receive information and ideas." *Id.*

> 'This freedom [of speech and press] . . . necessarily [408 U.S. 763] protects the right to receive . . . .' Martin v. City of Struthers, 319 U.S. 141, 143 (1943) . . . ." Stanley v. Georgia, 394 U.S. 557, 564 (1969). This was one basis for the decision in Thomas v. Collins, 323 U.S. 516 (1945). The Court there held that a labor organizer's right to speak and the rights of workers "to hear what he had to say," id., at 534, were both abridged by a state law requiring organizers to register before soliciting union membership. In a very different situation, Mr. Justice White, speaking for a unanimous Court upholding the FCC's "fairness doctrine" in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-390 (1969), said:
>
> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." Id., at 390.
>
> And in Lamont v. Postmaster General, 381 U.S. 301 (1965), the Court held that a statute permitting the Government to hold "communist political propaganda" arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an unjustifiable burden on the addressee's First Amendment right. This Court has recognized that this right is 'nowhere more vital' than in our schools and universities." (Citations omitted) 408 U.S. at 763.

Where, however, the "right to know" has been recognized by this Court it has been only in the context of the free exchange of ideas where the right asserted was a right to confer, debate and converse with another person who was expressing novel political and social ideas.

Even then, as indicated, by *Kleindienst,* which involved the First Amendment right to know in its purest form i.e., the right to debate and freely exchange ideas, a balancing test between First Amendment rights and a Government's regulatory authority is appropriate. In balancing these two interests, access to alternative means to receive the same information is a relevant factor.[5] *Id.*

There is nothing in *Kleindienst,* however, which suggests that the First Amendment right to know extends to the right to receive *commercial* speech in a *particular manner.* Commercial speech, such as the speech sought to be received in this case, does not involve an exchange of ideas or the opportunity for face to face debate and discussion which was at issue in *Kleindienst, supra.* Similarly, the right to

[5] It was stipulated that consumers had alternative means by which they could acquire information regarding the cost of medication. Stipulation of Facts ¶¶ 25 and 28, J.A. 15.

know asserted here differs markedly from the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which was at issue in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. at 390 (1969). See also *Garrison* v. *Louisiana,* 379 U.S. 64 (1964). In short, the right to receive commercial speech is entitled to no broader protection than the right to publish commercial speech.

Moreover, the effect of the price advertising statute on consumers, though related to their health, is clearly economic. Consumers are not estopped from acquiring necessary drugs. As alleged, they must pay more for such drugs. Economic interests and considerations, do not, however, rise to the dignity of constitutional rights. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). Even if there is such a constitutional right, there is not thereby created a correlative right to receive or for others to dispense such information. Compare *Stanley* v. *Georgia,* 394 U.S. 557 (1969) and *U.S.* v. *Orito,* 413 U.S. 139, 141 (1973); *U.S.* v. *Thirty Seven (37) Photographs,* 402 U.S. 363 (1971). "Government has a legitimate interest in protecting the public commercial environment. . . ." *U.S.* v. *Orito,* 413 U.S. at 143.

The Court below, in short, failed to consider the obvious distinction between First Amendment speech and commercial advertising. It, without explanation, extended to consumers a right to receive information that it acknowledged pharmacies had no such right to publish.

The Court below arrogated unto itself the powers of the Virginia General Assembly. It is clear that the court considered the advertising proscription economically unsound and substituted its wisdom for that of the Virginia legislature. The decision of the court below is a throwback to the days in which courts "exalted substantive due process by

striking down state legislation which a majority of the Court deemed unwise." *North Dakota Pharmacy Bd.* v. *Snyder's Stores, supra.* The decision of the court below is "a derelict in the stream of the law," *Id.* at 167, clearly deserving reversal.

No decision of this Court has ever gone so far. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), *Martin* v. *Struthers,* 319 U.S. 141 (1942) have emphasized the correlative right to receive information where there was a protected right to speak or distribute. This is but common sense. It would certainly stymie an individual's ability to communicate if the state could interfere with the receipt of such information.

The instant decision, however, holds that notwithstanding a state's legitimate interest in controlling advertising of services by professions, a consumer has a First Amendment "right-to-know" which abrogates such control. Such a holding means a possible invalidation of those statutes which prohibit advertising by doctors, lawyers and all others in professional fields.[6]

---

[6] The right to know is already being used as the basis for challenging a Maryland statute which prohibits doctors from advertising. *Public Citizens Health Research Group, et al.* v. *Commission on Medical Discipline of Maryland,* Civil Action No. B74-56 U.S.D.C. for the District of Maryland, is the basis for a suit seeking invalidation of the prohibition against advertisement of attorneys' fees *Consumer's Union et al.* v. *American Bar Association and the Virginia State Bar Association,* C.A. No. 75-0105-R, United States District Court, Eastern District of Virginia, and was used in a number of other pharmacy related cases. *See* for example, *Massachusetts Public Interest Research Group, Inc., et al.* v. *Massachusetts State Board of Registration in Pharmacy, et al.,* C.A. No. 74-5221-C, United States District Court, District of Massachusetts, action stayed pending decision of the Virginia case, and *Terry* v. *California State Board of Pharmacy, et al.,* C.A. No. C-74-1091-RFP, United States District Court, Northern District of California, ... F. Supp. ..... (May 12, 1975). In *Terry* the California court simply balanced the need for the ban against the need of the consumer to know. It made a "legislative" decision that the ban was not justified; further the state was required to justify the ban with a compelling inerest.

The validity of state statutes cannot be dependent upon who sues. In Virginia, the very statute involved herein was declared valid when pharmacists brought suit, *Patterson* v. *Kingery, supra,* and then was declared invalid when consumers brought suit. This is, as indicated, an anomaly in the law, which cannot stand.

What appellees and the lower court are doing, is merely substituting for the Fourteenth Amendment, a First Amendment "right to know." Once the substitution is completed the courts will once again be deciding which legislation is wise. The wisdom of legislation is not a field for the judiciary. It was rejected by this court over 40 years ago and should not be allowed to once again breathe new life, in a different guise.

CONCLUSION

To grant a First Amendment "right to know" in the field of commercial advertising will return courts to that vintage of decisions wherein legislation was struck down where it was deemed unwise. And to return to that era in the guise of the First Amendment, where states will have to justify their internal and commercial affairs by a compelling interest standard, would indeed put a derelict in the stream of law which could not be bypassed. The decision of the lower court should be reversed.

Respectfully submitted,

VIRGINIA STATE BOARD OF PHARMACY, ET AL.

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Chief Deputy Attorney General

D. PATRICK LACY, JR.
Deputy Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Anthony F. Troy, Chief Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Virginia State Board of Pharmacy in the above-captioned matter, hereby certify that three (3) copies of this Brief of Appellant have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 2nd day of June, 1975, as follows:

James W. Benton, Jr., Esquire
Hill, Tucker and Marsh
214 East Clay Street
Richmond, Virginia 23219

Raymond T. Bonner, Esquire
Allan B. Morrison, Esquire
Suite 515
2000 P Street N.W.
Washington, D.C. 20036

Attorneys for Appellees

All persons required to be served have been served.

ANTHONY F. TROY
Chief Deputy Attorney General

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, *et al.*,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER
COUNCIL, INC., *et al.*,
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEES

ALAN B. MORRISON
GIRARDEAU A. SPANN
Suite 700
2000 P Street NW
Washington, D.C. 20036
(202) 785-3704
Attorneys for Appellees

ABE DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-6537

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IN THE

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VIRGINIA CITIZENS CONSUMER COUNCIL, INC., *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF APPELLEES

QUESTION PRESENTED

Can the State of Virginia constitutionally prohibit the dissemination of drug price information and thereby deny consumers the facts that they need to make informed decisions about where to purchase the drugs that their doctors prescribe for them?

STATUTES INVOLVED

This case involves the constitutional validity of Section 54-524.35(3) of the Code of Virginia (1974). The relevant statutes are set out below.

Section 54-524.22:1 of the Code of Virginia provides in pertinent part:

> The Board of Pharmacy may refuse to issue, revoke, suspend, refuse to renew any license, permit, or registration and/or impose a civil monetary penalty provided for in §54-524.107 or deny any application if it finds that:
>
> * * *
>
> (c) He has been guilty of unprofessional conduct as prescribed in §54-524.35;

Section 54-524.35 of the Code of Virginia provides in pertinent part:

> Any pharmacist shall be considered guilty of unprofessional conduct who
>
> * * *
>
> (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or
>
> (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

STATEMENT OF THE CASE

Section 54-524.35(3) of the Code of Virginia prohibits pharmacists from publishing, advertising, or promoting, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for the sale of prescription drugs. As a result of this statutory provision, there was no publication or advertising of prescription drug prices in Virginia, before the court below enjoined enforcement of the statute, and it was difficult for plaintiffs-appellees and all other Virginia consumers to obtain comparative price information about the prescription drugs that their doctors advised them to take. (Stip. 23, 25, 26 & 28; App. 14-16)[1]

Dissemination of prescription drug price information had been illegal in Virginia since 1968. Under the guise of preventing unprofessional conduct, the Virginia Pharmaceutical Association actively lobbied against drug price disclosure in order to insulate pharmacists from price competition by discount pharmacy chains who were willing to sell prescription drugs at lower prices.[2] The adverse impact that the Virginia statute had on consumers is substantial. Not only did the statute foster an unjustifiable inflation of prescription drug prices, but it deprived consumers of the very

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[1] "Stip." refers to designated paragraphs of the parties' Stipulation of Facts. "App." refers to designated pages of the Appendix.

[2] *See Patterson Drug Co. v. Kingery*, 305 F.Supp. 821, 825 (W.D.Va. 1968) (three-judge court).

price information that they needed to protect themselves from the high cost of prescription drugs. Although each of us, at one time or another, must use prescription drugs, consumers in Virginia received more price information about dog food and hair spray than about drugs which a doctor may have prescribed to save their lives.

The detrimental effect that section 54-524.35(3) of the Virginia Code had on competition is striking. Retail prices for identical prescription drugs varied considerably, even within one geographic area of the State. In Northern Virginia, for example, the price of 40 tetracycline tablets, a standard prescription quantity, could cost as little as $1.68 or as much as $3.90 – a price difference of 132% – depending upon which store the drug was purchased in. In Richmond, the price of 40 Achromycin tables varied from $2.59 to $6.00, a 140% price difference, and in the Newport News-Hampton, Virginia peninsula area, the price of a frequently prescribed amount of tetracycline varied from $1.20 to $9.00, or 650%.[3] In the same geographic areas, prices of non-prescription drugs, for which advertising is both permitted and practiced, do not even approach this tremendous degree of variation. (Stip. 21; App. 13-14).

There is no doubt that the wide variations in Virginia prescription drug prices were caused by the statutory prohibition on drug price advertising. The absence of advertising resulted in a lack of competition, causing excessively high prescription drug prices.[4] The United States Depart-

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[3] These dramatic price variations, as well as other examples of vast price differences for identical prescription drugs are included in paragraph 22 of the Stipulation. (App. 14).

[4] *See* testimony of Myron D. Winkelman, paragraphs 6-8 (App. 50-51).

ment of Justice, as the executive agency responsible for enforcement of the antitrust laws, has urged the elimination of such statutes precisely because of their adverse impact on competition. After citing several studies which found broad price differentials in areas where advertising was prohibited, including an American Medical Association survey showing 1200% price variations in Chicago for identical drugs, a Justice Department research paper and policy statement concluded:

> Competition is our basic national policy. It has proven to be the most effective spur to business efficiency, innovation, and low prices. Prohibitions on drug advertising represent departures from this national economic policy . . . .
>
> The Department of Justice believes that the major effect of legislation or regulations prohibiting price advertising of prescription drugs is to reduce retailer incentives to engage in price competition with resulting higher costs to the public . . . . It is the Department's view that such a premise [the belief that advertising of prescription drugs will endanger the public health] is largely erroneous and that, to the extent that public health dangers might pose problems, that can be met by methods which stop short of the absolute prohibition of price advertising . . . .
>
> Accordingly, it is the Department's view that existing state legislation or regulations which prohibit or restrict price advertising of prescription drugs may well be adverse to the public interest. Since such restrictions appear to be unnecessary to protection of the public and result in unjusti-

fiable expenditures by consumers, the Department feels they should be eliminated. (App. 22, 23 & 27).

The staff of the Federal Trade Commission has recently taken a similar position. On June 4, 1975, the Commission published and solicited comments on a proposed trade regulation that would eliminate state prohibitions on prescription drug advertising because of the adverse economic impact that such prohibitions have on consumers.[5] Remedial action by the Federal Trade Commission is still in its germinal stages, and it is not clear that the Commission has the authority to overrule state prohibitory statutes. Nevertheless, the proposed regulations further evidence a recognition by the federal government of the need to eliminate anticompetitive legislation such as the statute here at issue.

Not only has the Virginia statute caused unjustified drug price increases, but it has denied consumers the only means they have of protecting themselves from exploitation by the Virginia pharmacists who are immune from competition. Few consumers would pay $9.00 for tetracycline when they could purchase it at another pharmacy in the same neighborhood for $1.20. (*See* Stip. 22(c)(1); App. 14). However, many consumers did not even know about this price difference, and even if they did, it would have been difficult for them to shop for the best price because comparative price

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[5] The proposed regulation is published at 40 *Fed. Reg.* 24031. Presently, only sixteen states and the District of Columbia place no restrictions on drug price advertising. The remaining 34 states regulate the dissemination of drug price information through various combinations of statutory and regulatory prohibitions. *See* Staff Report on Prescription Drug Price Disclosures, submitted to the Federal Trade Commission on January 28, 1975, pp. 17-18.

information was so difficult to obtain. The Virginia statute clearly prohibits dissemination of price information in newspapers or other media enabling easy consumer access. Many pharmacists, however, believe that the Virginia statute also prohibits them from disclosing prescription drug prices over the telephone. (Stip. 25; App. 15). This means that often consumers could shop intelligently for drugs only by walking from store to store and asking what the price of a given drug was. Many consumers, therefore, did not attempt price comparisons because of the great inconvenience involved, while others, such as the aged and the infirm, are physically unable to engage in door-to-door pricing. Even where telephone inquiries were answered, the cost of a series of phone calls could be significant for those on small fixed incomes.

Many consumers were forced to tighten their belts and to do without other items because of the high prices that they had to pay for prescription drugs in Virginia. The Virginia statute, however, hit hardest at the poor, and at senior citizens who are frequently on fixed incomes, yet have four times the per capita expenditure on prescription drugs that individuals under age 65 do.[6] Also hard hit were those like appellee Lynn B. Jordan who suffer from conditions or diseases that require use of prescription drugs on a daily maintenance basis. For these consumers, every dollar spent on prescription drugs is a dollar which is unavailable for other necessities. For them the information concealed by the Virginia statute is not only helpful, but essential.

Section 54-524.35(3) of the Virginia Code had a profound, adverse economic impact on appellees. Because of

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[6] *See Terry v. California State Board of Pharmacy*, ___F.Supp.___, No. C-74-1091 RFP (SJ), slip op. at 4 (N.D. Cal. May 12, 1975)(three-judge court).

this statute, appellees and the individual consumers they represent, were at the economic mercy of pharmacists in Virginia who were free from the therapeutic effects of competition. Not only were consumers required to pay high prescription drug prices, but they were denied essential information which they have a fundamental right to receive. Accordingly, on July 11, 1973, this action was commenced in order to remove the statutory bar that prevented appellees from obtaining access to this vital price information.

Plaintiff-appellee Virginia Citizens Consumer Council, Inc. is a non-profit, non-partisan, volunteer organization incorporated in Virginia, with a membership of approximately 150,000, many of whom are users of prescription drugs. Plaintiff-appellee Virginia State AFL-CIO is an unincorporated, non-profit labor organization with approximately 69,000 members who are residents of Virginia, many of whom are users of prescription drugs. Plaintiff-appellee Lynn B. Jordan is a resident of Virginia. She suffers from certain diseases which require her to take prescription drugs on a daily basis. (Stip. 1, 2 & 3; App. 9). Defendants-appellants are the Virginia State Board of Pharmacy and the five individual members of the Board who regulate the practice of pharmacy in Virginia. (Stip. 4 & 5; App. 9-10). In their official capacity, appellants are empowered by section 54-524.22:1 of the Virginia Code to discipline pharmacists who disseminate drug price information in violation of the Virginia statutory prohibition, including the suspension or revocation of a pharmacist's license to practice.

In the court below, appellants, who have had previous experience defending this statute,[7] were given a full opportunity to offer arguments in support of the statute's validity, yet they offered only two justifications for its enactment. After considering all of the evidence offered by appellants, the court rejected the contention that dissemination of drug price information would so demean the profession of pharmacy that public health, safety, and welfare would thereby be endangered. 373 F.Supp. at 687. (JS App. 9).[8] Similarly, the court declined to accept appellants' argument that monitoring justified the statute's interference with appellees' First Amendment rights. *Id.* Indeed, the record contains no evidence whatsoever that monitoring was even considered by the Virginia legislature in passing section 54-524.35(3), let alone that it was the reason for which the statute was enacted. Finding that consumers have a fundamental right to receive drug price information, the court held that section 54-524.35(3) of the Code of Virginia was unconstitutional as a violation of appellees' First Amendment rights and enjoined its enforcement. It is from that order, which has remained in force since March 1974, that this appeal has been taken.

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[7] In *Patterson Drug Co. v. Kingery, supra,* appellants defended the predecessor to the present statute from constitutional attack.

[8] The opinion below is reported as *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy,* 373 F.Supp. 683 (E.D.Va. 1974), and is reproduced at pages 1-9 of the Appendix to appellants' Jurisdictional Statement. "JS App." refers to that Appendix.

SUMMARY OF ARGUMENT

Section 54-524.35(3) of the Code of Virginia, which prohibits the dissemination of all prescription drug price information, unconstitutionally denies appellees and the consumers they represent meaningful access to drug price information in violation of their First Amendment rights. Appellants have urged this Court to reverse the decision of a three-judge district court declaring section 54-524.35(3) unconstitutional, arguing that the First Amendment does not protect appellees' right to receive drug price information because that information is "commercial speech" to which the First Amendment does not apply. However, just last term in *Bigelow v. Virginia*, ___ U.S. ___, 43 U.S.L.W. 4734 (June 16, 1975), this Court ruled that this is not the law. While an earlier decision of the Court, *Valentine v. Chrestensen*, 316 U.S. 52 (1942), suggested that First Amendment protection of some "commercial speech" was limited, the holding there was a narrow one which does not control this case. It is now clear, as a result of *Bigelow*, that a State cannot abridge First Amendment rights simply by placing a "commercial" label on the type of speech that it desires to suppress. Because the drug price information sought by appellees does not fall within any of the narrow categories of speech which the Court has found to be unprotected by the First Amendment, the First Amendment applies with full force in the context of this case.

Appellees have an independent First Amendment right to receive drug price information which is not derivative from the rights of speakers to disseminate that information. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Martin v.*

Struthers, 319 U.S. 141, 143 (1973). The First Amendment protects communications, and a communication is not complete until there has been both dissemination and receipt of information. Therefore, it is necessary to examine the entire context in which information is exchanged to determine the scope of First Amendment protection. Consequently, appellants' contention that this Court cannot recognize appellees' First Amendment rights to receive drug price information because a district court in *Patterson Drug Co. v. Kingery, supra*, refused to recognize pharmacists' rights to disseminate price information is wholly without merit.

Because First Amendment rights are at stake in this action, the Virginia statutory prohibition on drug price advertising can be upheld only if appellants demonstrate that the State had a compelling interest in enacting this legislation. Appellants must show that the actual purposes served by the statute are legitimate purposes, that the statute is the least intrusive means of achieving those purposes, and that on balance, the State's interest in suppressing drug price information outweighs appellees' interest in receiving the information to which the First Amendment entitles them. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 438-39 (1963); *Lamont v. Postmaster General, supra*, 381 U.S. at 307; *Sheldon v. Tucker*, 364 U.S. 479, 488-90 (1960); *Talley v. California*, 362 U.S. 60, 62-64 (1960); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). Appellants have made no such showing; rather, they have merely asserted that in some instances a State may regulate health care professions. In support of this proposition, appellants cite four Fourteenth Amendment cases in which this Court upheld state statutes against equal protection and substantive

due process attacks. Those cases are inapposite to the present situation, however, because they are factually distinguishable and because none of them involved First Amendment rights. As a result, in those cases the Court did not apply the strict scrutiny, compelling interest test which must be utilized here, but upheld the statutes after only the minimal scrutiny, rational relationship test utilized in Fourteenth Amendment cases.

Applying the proper strict scrutiny test to the present statute, as the district court did below, results in its invalidation as constitutionally infirm. Appellees have substantial First Amendment interests in receiving drug price information. This information will allow them to make intelligent purchases of the drugs that they need in a market where there are vast variations in retail prices of identical products. In addition, dissemination of price information will revive competition in the retail drug industry, thereby reducing prices to consumers.

Against these benefits, appellants offer only two justifications for the statutory prohibition. They suggest that dissemination of price information will demean the profession of pharmacy and will interfere with those few pharmacists who monitor their customers' drug use. As the district court found, there is no evidence in the record to indicate that price advertising will demean the profession of pharmacy in a way that will adversely affect the public health, safety, or welfare. In addition, there is no evidence to show that monitoring was even considered as a purpose for this statute or that monitoring is necessary for the protection of the public. The record does, however, contain evidence that monitoring is a nonessential and infrequently used practice.

Finally, if monitoring is desirable, Virginia can mandate it legislatively in a manner that does not abridge appellees' First Amendment rights. It is apparent that the only function served by the statute in question is to free pharmacists from price competition at the expense of consumers who have no choice but to pay outrageously high prices for the drugs that their doctors have directed them to take. This does not constitute a legitimate state interest and does not outweigh appellees' First Amendment rights to receive drug price information. Therefore, the Virginia statutory prohibition on the dissemination of drug price information must be overturned as an unconstitutional abrogation of appellees' First Amendment rights.

ARGUMENT

I. COMMUNICATION OF INFORMATION CONCERNING THE PRICE OF PRESCRIPTION DRUGS TO CONSUMERS IS PROTECTED BY THE FIRST AMENDMENT.

The statute under consideration here suppresses both the dissemination and receipt of useful drug price information. It is not disputed that the information which appellees desire to receive is speech. Appellants, however, argue that this speech is entitled to no First Amendment protection because it provides consumers with information that is useful to them in purchasing prescription drugs. As such, appellants label the information "pure commercial speech" and conclude that the First Amendment is thereby rendered inapplicable. (D.Br. 9-10).[9] Appellants

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[9] "D.Br." refers to the brief of defendants-appellants in this Court.

claim that *Valentine v. Chrestensen, supra,* is authority for the total immunization of this statute from First Amendment scrutiny. This is not the case, however, since a number of subsequent decisions of this Court demonstrate that *Chrestensen* does not stand for the all-or-nothing proposition asserted by appellants.

A. The First Amendment Applies To Drug Price Information.

Appellants argue that First Amendment considerations are inapplicable to the present case because appellees desire information that would be disseminated in paid commercial advertisements. Last term in *Bigelow,* however, this Court held a Virginia statute unconstitutional which prohibited the publication or advertising of information relating to abortion services because it violated the First Amendment rights of the publisher of that information and interfered with the interest that the public had in receiving it. Writing for the Court, Mr. Justice Blackmun stated:

> . . . The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relation,* 413 U.S. 376, 384 (1973); *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964).
>
> The fact that the particular advertisement in appellant's newspaper had commercial aspects or

> reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," *Murdock v. Pennsylvania,* 319 U.S. 105, 110-111 (1943), or because appellant was paid for printing it, *New York Times Co. v. Sullivan,* 376 U.S. at 266, *Smith v. California,* 361 U.S. 147, 150 (1959), or because appellant's motive or the motive of the advertiser may have involved financial gain, *Thomas v. Collins,* 323 U.S. 516, 531 (1945). The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States,* 383 U.S. 463, 474 (1966). [___ U.S. at ___, 43 U.S.L.W. at 4737, slip. op. at 8.]

Appellants' contention that *Chrestensen* must be read broadly enough to remove the instant case from the ambit of First Amendment protection because the dissemination of drug price information merely proposes a commercial transaction is also disposed of by *Bigelow:*

> But the [*Chrestensen*] holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se.* [footnote omitted].

This Court's cases decided since *Chrestensen* clearly demonstrate as untenable any reading of

that case that would give it so broad an effect. [___ U.S. at ___, 43 U.S.L.W. at 4737, slip op. at 9-10.]

It does not suffice, therefore, to assert that drug price advertising is unprotected speech because it does no more than propose a commercial transaction. In *Bigelow*, the subject advertisements facilitated obtaining abortions by proposing a commercial transaction in which a referral service accepted a fee for making abortion arrangements. An exchange of money accompanied the placement of the advertisement, the referral itself, and the actual abortion. The financial transactions, however, were incidental to the dissemination of useful information concerning health care. As the *Bigelow* opinion states:

> The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest . . . ."
>
> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience. [___ U.S. at ___, 43 U.S.L.W. at 4738, slip op. at 11-12.]

This language applies with equal force to the instant case. The drug price information sought by appellees is of "clear public interest" because its dissemination will not only enable comparison shopping but will reduce retail drug prices. Although incidental commercial transactions necessarily accompany the obtaining of prescription drugs, drug price advertising conveys important information about health care needs, and as such, is of "interest and value to a diverse audience." As the three-judge court below noted, 373 F.Supp. at 686,

> the actual suitors are consumers; their concern is fundamentally deeper than a trade consideration. While it touches commerce closely, the overriding worry is the hindrance to a means for preserving health or even saving life.

Where, as here, the desired information is necessary to ease the economic injury inflicted on consumers by Virginia pharmacists, appellees' claim to First Amendment protection has added vitality. As this Court said in *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940):

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period.

The fact that economic decision-making is involved in this case does not, as appellants argue, eliminate First Amendment concerns, but rather enhances them. *See Dun & Bradstreet v. Grove*, 404 U.S. 898, 905-06 (1971)(Douglas, J., dissenting); *F.T.C. v. Proctor & Gamble Co.*, 388 U.S. 568, 603-04 (1967)(Harlan, J., concurring); *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 277 (D.C. Cir. 1975).

Several lower courts have also considered the scope of First Amendment protection in a commercial context and have held that the First Amendment continues to protect the rights of those who would disseminate and receive commercial information. *See, e.g., Hiett v. United States*, 415 F.2d 664 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Terry v. California State Board of Pharmacy, supra; Associated Students for the University of California at Riverside v. Attorney General*, 368 F.Supp. 11 (C.D.Cal. 1973) (three-

judge court); *Atlanta Coop. News Project v. U.S. Postal Service*, 350 F.Supp. 234 (N.D.Ga. 1972)(three-judge court). A recent decision by a three-judge court for the Southern District of New York in *Population Services International v. Wilson*, ___ F.Supp. ___ . No. 74 Civ. 1572, slip op. at 41 (July 2, 1975), invalidated a state statute which prohibited anyone but a licensed pharmacist from advertising contraceptives. The court there relied on *Bigelow* in holding that the statute offended the First Amendment, even though commercial advertising was at issue.

The incidental commercial context in which drug price advertising occurs does not eliminate the protection offered by the First Amendment. Nor does the information which appellees desire fall into any of the narrow categories of speech which have been held to be unprotected by the First Amendment, such as fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); obscenity, *Roth v. United States*, 354 U.S. 476, 481-485 (1957); *Miller v. California*, 413 U.S. 15, 23 (1973); libel, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); or incitement, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See Bigelow v. Virginia, supra*, ___ U.S. at ___, 43 U.S.L.W. at 4737, slip op. at 8-9. Consequently, the First Amendment protects the drug price information which appellees desire to receive.

B. Appellees Have a Right to Receive Drug Price Information.

Since the First Amendment applies to drug price information, appellees and the consumers they represent have a right to receive that information. As even appellants concede, the First Amendment is intended to foster communication,

and communication requires both the dissemination and receipt of information. (D.Br. 17). The right to receive information has, therefore, been recognized by this Court as necessary to the proper functioning of the First Amendment. *Kleindienst v. Mandel, supra*, 408 U.S. at 762-63; *Stanley v. Georgia, supra*, 394 U.S. at 564; *Lamont v. Postmaster General, supra*, 381 U.S. at 307; *Martin v. Struthers, supra*, 319 U.S. at 143. As Mr. Justice Brennan said, concurring in *Lamont v. Postmaster General, supra*, 381 U.S. at 308, "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."

Appellants argue, however, that the decision of a three-judge district court for the Western District of Virginia in *Patterson Drug Co. v. Kingery, supra*, forecloses this Court from recognizing any First Amendment right that appellees have to receive drug price information. (D.Br. 12ff.). *Patterson* upheld the constitutionality of the predecessor to the statute here under consideration in an action brought by a pharmacist and a drug company on Fourteenth Amendment, due process grounds.[10] Relying on that decision, appellants argue that consumers have no right to receive drug price information because pharmacists can be prevented from disseminating such information. Appellees' First Amendment rights to receive drug price information, however, are not derivative rights. They are independent rights which cannot be nullified by a district court's substantive due process decision. In *Kleindienst v. Mandel, supra*, 408 U.S. at 762-63, this Court recognized the rights of college professors

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[10] One sentence in the *Patterson* opinion was devoted to the plaintiffs' First Amendment claim. While the court rejected that claim, it never considered First Amendment rights that consumers have to receive drug price information. *See* 305 F.Supp. at 825.

to receive information from a non-resident alien while making it clear that the alien himself did not have constitutional rights which required protection. This directly undercuts appellants' contention that the right to receive information can never be broader than the right to disseminate it. (D.Br. 16).

It must also be emphasized that appellees' First Amendment rights to receive drug price information through advertisements cannot be abridged by arguing that alternative methods exist for obtaining this needed information. Again, *Kleindienst v. Mandel* is instructive in its emphatic rejection of this argument in a context where the right to know could have been exercised by reading books and making telephone calls. 408 U.S. at 765.[11] There, only face-to-face exchanges of information were prevented, but this Court was unwilling to find that the many available alternatives were sufficient to dispose of the plaintiffs' First Amendment claims. *Id.* In the situation presently before the Court, no adequate alternatives exist for obtaining drug price information. Publications are totally unavailable, and telephone calls are frequently useless. As a result, it may often be necessary to undertake the extreme inconvenience of personally visiting many pharmacies in order to obtain comparative price information, an exercise in which the old and immobile cannot engage. (*See* Stip. 25 & 27; App. 15).

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[11] *See also Terry v. California State Board of Pharmacy, supra,* slip op. at 12, where a three-judge district court for the Northern District of California held a statute similar to that here under consideration unconstitutional because it denied consumers the right to receive drug price information even though pharmacists in California are required by law to post the prices of the 100 most frequently used drugs and to answer all oral and written requests for drug prices.

While appellees have a strong interest in receiving drug price information, the interest of the State of Virginia in continuing to conceal this information is questionable. Where First Amendment rights are involved, as they are here, the competing interests of the individual and the state must be balanced, and state regulation can be sustained only where the state's interest proves to be the more substantial. Appellants have attempted to avoid such a balancing of interests by applying the label "commercial speech" to drug price information and arguing that the First Amendment does not apply. This Court has explicitly rejected such an evasive approach to the First Amendment, however.

> The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button,* 371 U.S. at 429. Regardless of the particular label asserted by the State – whether it calls speech "commercial" or "commercial advertising" or "solicitation" – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. [*Bigelow, supra,* ___ U.S. at ___, 43 U.S.L.W. at 4739, slip op. at 16.]

Inquiry must, therefore, be made into the justification for section 54-524.35(3) of the Virginia Code to see if it bears a sufficient relationship to the health and safety of Virginia residents, to withstand appellees' First Amendment challenge.

II. APPELLEES' SUBSTANTIAL INTEREST IN OBTAINING DRUG PRICE INFORMATION GREATLY OUTWEIGHS ANY INTEREST THAT THE STATE MAY HAVE IN SUPPRESSING THAT INFORMATION.

Having concluded that the First Amendment protects appellees' rights to receive drug price information, the Court must balance appellees' First Amendment interests against the State's asserted interest in preventing the dissemination of drug price information in order to determine the statute's constitutionality. Because First Amendment rights are involved, the State must satisfy a two-part test. If the statute is to be upheld, the State must first show that it has a compelling interest in achieving some legitimate end sought to be advanced by the statute. *N.A.A.C.P. v. Button, supra,* 371 U.S. at 438-39; *Lamont v. Postmaster General, supra,* 381 U.S. at 308-09 (Brennan, J., concurring). *See Dunn v. Blumstein, supra,* 405 U.S. at 342-43. Secondly, the state must show that the statute is drawn as narrowly as possible and that no less restrictive means of regulation will suffice. *N.A.A.C.P. v. Button, supra,* 371 U.S. at 438-39; *Sheldon v. Tucker, supra,* 364 U.S. at 488-90; *Talley v. California, supra,* 362 U.S. at 62-64; *Dunn v. Blumstein, supra,* 405 U.S. at 343; *Broadrick v. Oklahoma, supra,* 413 U.S. at 611-12. Only if these two conditions are satisfied, and the interest of Virginia in concealing drug price information is found to outweigh appellees' First Amendment interests in receiving that information, can the statute be upheld.[12]

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[12] The Court is not required to determine whether the public's interest in receiving drug price information is as important as the (continued)

This Court has never held that where the First Amendment applies, the compelling state interest test is any less applicable merely because protected speech occurs in a commercial context. However, even if the Court were to fashion a new doctrine under which commercial speech could be regulated upon a showing of less than a compelling state interest, under the facts of this case, the statute in question could still not be sustained. The First Amendment contains perhaps the most fundamental of the individual rights secured by the Constitution. Consequently, any state legislation which interferes with the exercise of First Amendment rights must at the very least be viewed with a healthy skepticism. In addition, the less compelling a particular state interest becomes, the greater the need for insuring that the legislation is the least intrusive method of regulation possible.

The Court need not dwell upon the precise state interest necessary to withstand First Amendment attack because this case is similar to *Bigelow* where the statute under review bore so little relation to a legitimate state purpose that the Court invalidated it without even discussing the precise test which it was applying. The *Bigelow* opinion did state that at the very least there must be "a clear relationship between the advertising in question and an activity that the government was legitimately regulating." ___ U.S.

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[12] (continued)
public's interest in receiving information that is of philosophical, political, moral or aesthetic value. All of these interests are protected by the First Amendment, but the only balancing that is required here is the balancing of appellees' interest in receiving drug price information against any legitimate interest that the State may have in limiting access to it.

at ___ n.10, 43 U.S.L.W. at 4739 n.10, slip op. at 15 n.10. Such a relationship is not present here, however. While Virginia certainly has an interest in protecting the health and welfare of users of prescription drugs, that interest is not advanced by the statute under consideration. In fact, the relationship between the present statute and any legitimate interest of the State of Virginia is so attenuated that it is doubtful that the statute could withstand even the minimal scrutiny required in Fourteenth Amendment substantive due process cases under this Court's decision in *North Dakota Pharmacy Board v. Snyder's Stores, Inc.*, 414 U.S. 156 (1973), and the other due process decisions on which appellants rely in this First Amendment case. (*See* D.Br. 10-11).[13]

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[13] In addition to *North Dakota Pharmacy Board*, appellants cite *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935), *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), and *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), for the proposition that this statute must be sustained if it bears any rational relationship to a legitimate state end. Appellees do not believe that the statute meets even a rational relationship test, but in any event, that is not the test to be applied. This is a First Amendment case, involving fundamental guarantees secured by the Bill of Rights, not a Fourteenth Amendment case where states are allowed great latitude in enacting regulatory schemes designed to protect their citizens.

Neither *North Dakota Pharmacy Board*, *Semler*, nor *Williamson* was brought by individuals who sought to receive vital information. In addition, the mode of regulation in each of those cases at least arguably bore some relationship to a legitimate end which the state was actually trying to attain. In *McDonald* the Court sustained against Fourteenth Amendment equal protection attack, a statute which did not authorize receipt of absentee ballots by prison inmates awaiting trial. The Court ruled, however, that because

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A. Appellees And All Other Consumers Have A Significant Need For Drug Price Information.

Appellees' interest in receiving drug price information is substantial. If drug prices were advertised in Virginia, appellees and all other prescription drug consumers would be able to make reasoned choices about where to make their needed purchases. In addition, special programs, such as those offering discounts to senior citizens who are frequently on fixed incomes and who have expensive drug needs, would be more effective and better utilized because more consumers would know about them.[14]

More importantly, however, the effective dissemination of drug price information would revive competition in Virginia and thereby reduce the price of prescription drugs. Not only would this significantly benefit each consumer in the State, but competition would benefit the public generally by implementing "sound economic and social policy."[15] Expenditures of both federal and state governments on prescription drugs through Medicare and Medicaid programs would also be reduced as a result of drug price disclosure. Finally, prescription drug prices would

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[13] (continued)
the record failed to show that petitioners were prevented from voting by the operation of the statute, as opposed to some other causes, only the rational relationship test, rather than the compelling interest test required in First Amendment cases, had to be met. 394 U.S. at 807-08

[14] *See* testimony of Myron D. Winkelman, paragraph 5. (App. 50).

[15] *Research Paper and Policy Statement of the United States Department of Justice Regarding State Restrictions on the Advertising of Retail Prescription Drugs.* (App. 23).

more accurately reflect the value of the retail items being purchased. Pharmacists in Virginia would no longer be able to mask high mark-ups that are unrelated to costs or to the provision of any service. If drug price information were available, consumers would have a better understanding of how much they were paying for drugs and how much extra they were paying as charges for services which they may not have requested and may not even desire. This would then enable a determination by each consumer of whether the services received were worth the prices charged for them. All of these considerations weigh heavily against the constitutionality of the Virginia statute.

The need for drug price information can be better appreciated once it is recognized how vast a role prescription drugs play in our economy. In 1970 prescription drug expenditures by Americans totaled more than $9 billion. (Stip. 17; App. 12). In this context, prescription drug price differentials which have been documented to be as high as 1200% are plainly significant. (Stip. 22(d); App. 14). Pharmacists vastly increase their profits in both percentage terms and in absolute dollars by insulating themselves from competition, while consumers suffer equally vast economic injuries which they are helpless to prevent.

Appellees have recognized and tried to end the hardship caused by the unavailability of objective drug price information, as have agencies of the federal government who are charged with protecting the very consumer interests that the Virginia statute frustrates. (*See* App. 21-27). Even the court in *Patterson Drug Co. v. Kingery, supra,* the case on which appellants so heavily rely, recognized that the anticompetitive situation existing in Virginia was

created by organized pharmacists for their own monetary benefit at the expense of consumers. 350 F.Supp. at 825. The interest of appellees, shared by all members of the public, in terminating the concealment of drug price information requires great deference, and, as we demonstrate below, no interest of the State of Virginia in suppressing this information is sufficient to offset it.

B. The State Of Virginia Has No Legitimate Interest In Prohibiting The Dissemination Of Drug Price Information.

Appellants have cited two purposes to be served by Virginia's statutory prohibition on drug price advertising. First, they contend that the statute protects the public health, safety, and welfare by regulating the profession of pharmacy. Second, appellants argue that the statute aids those few pharmacists who monitor their customers' drug use by discouraging them from shopping at other pharmacies. The statute, however, bears very little relationship to either of these purposes. Moreover, to the extent that these are desirable objectives, they can be more directly and effectively achieved by other types of legislation which do not deny consumers their right to receive valuable drug price information.

1. The Professional Nature Of Pharmacy Does Not Justify the Statute Under Review.

In asserting that the practice of pharmacy is a "profession," appellants again seek to invoke a magic word that can uphold the validity of the Virginia statute without the

need to balance the interests involved.[16] As Mr. Justice Brennan stated, however:

> The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. [*N.A.A.C.P. v. Button, supra,* 371 U.S. at 438-39.]

In a further attempt to avoid meaningful balancing, appellants, who purport to recognize that this is a First Amendment case (D.Br. 4), rely on a series of substantive due process decisions in support of their argument that this Court may begin and end its inquiry simply by recognizing that under some circumstances, a state may regulate health professions. (D.Br. 4-7).[17] Appellants would have the Court sustain this statute if it bore no more than a rational relationship to a legitimate state end, despite the fact that First Amendment rights are at stake. Even under appellants' application of the Fourteenth Amendment minimal scrutiny test, however, it does not suffice to merely invoke the term "professional." The days in which professionalism was synonymous with freedom

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16 *See* page 21, *supra.*

17 As is noted above at page 24 n. 13, these Fourteenth Amendment cases do not control the present case.

from competition appear to be gone. *See Goldfarb v. Virginia State Bar,* ___ U.S. ___ , 43 U.S.L.W. 4723 (June 16, 1975).

Appellants emphasize that pharmacists receive special training and are licensed just as other professionals are. These facts, however, do not support the present statute because appellants never demonstrate any connection between the professional nature of pharmacy and the dissemination of drug price information. Selling prescription drugs in this country is a $9.14 billion a year retail industry. (Stip. 17; App. 12). While a small number of drugs are compounded by pharmacists, 95% of all prescriptions are filled by selling pre-manufactured dosage forms of prescribed drugs. (Stip. 18; App. 13).[18] Although pharmacists provide services to their customers, this does not change the nature of the retail sale. As the Treasury Department noted in requiring pharmacists to post base prices of prescription drugs as required by the Economic Stabilization Act:

> The dispensing of prescription drugs is considered to be a retail activity, and therefore, it is covered by Price Commission regulations requiring that base prices be posted. The fact that a professional pharmacist is employed to dispense drugs is incidental to the sale of those drugs and does not alter the retail nature of the transaction . . . .
>
> The requirement that pharmacists post base prices is in no way inconsistent with their recog-

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18 Other estimates of the percentage of drugs sold in pre-manufactured form are as high as 99%. *See* testimony of Myron D. Winkelman, paragraph 2. (App. 49).

nized professional standing, but is considered by the Price Commission to be necessary to achievement of stabilization objectives. (Stip. 19; App. 13).[19]

It is difficult to imagine any way that the dissemination of drug prices will demean the profession of pharmacy and thereby harm the public health, safety, or welfare. Drug price advertising is not promotional since prescription drugs can be obtained only after a licensed physician determines that they are necessary. Consequently, the State here has even less justification for enacting its prohibition than it did in *Bigelow* where this Court rejected the argument that Virginia had a sufficient interest in seeing that women who were considering abortions were not coerced into them by a referral agency. ___ U.S. at ___, 43 U.S.L.W. at 4741, slip op. at 4 (Rehnquist, J., dissenting).

There is also little danger that consumers will be victimized by false or deceptive advertising. We are not here talking about "puffing" or self-aggrandizement, but about price and discount information that is capable of objective verification. In addition, Virginia has already taken direct steps to eliminate deceptive advertising. Section 59.1-44 of the Virginia Code (1975 Supp.) prohibits "untrue, deceptive or misleading" advertisements of any type, and section 54-524.35(2) (1974) specifically prohibits a pharmacist from making statements "about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and

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[19] *See also* testimony of Myron D. Winkelman, paragraphs 2 & 4. (App. 49-50).

welfare." The First Amendment does not preclude Virginia from preventing deceptive advertising, but if that is the objective, the State must rely on its legislation directed specifically at that problem. As this Court stated recently in *Erznonik v. City of Jacksonville,* "[w]hen First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." ___ U.S. ___, ___, 43 U.S.L.W. 4809, 4813 (June 23, 1975).

There is no danger that reduced prices or special discounts will cause consumers to purchase excessive quantities of drugs that will become ineffective before they can be used. Few physicians could be persuaded to prescribe too large a quantity of drugs simply to allow a patient to take advantage of a bargain or quantity discount, and few patients would want to waste money on drugs they did not need. (Stip. 45; App. 19). Likewise, the statute cannot be justified by asserting that price competition will cause pharmacists to buy in bulk, thereby leaving drugs to sit on the shelf while they lose their potency. It would be unethical, unprofessional, and illegal for a pharmacist to dispense a drug which was adulterated or which had become dangerous or ineffective because of age or condition of storage. (Stip. 50; App. 21). The suggestion that prohibiting the dissemination of drug price information is a restraint on the behavior of professionals that is necessary to protect the public health, safety, and welfare is wholly without merit.[20]

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[20] Appellants have tried to create the impression that by striking down the statute presently under review, the Court will be forced to invalidate state prohibitions on advertising by doctors, lawyers, and other professionals. (D.Br. 17). We agree with

(continued)

2. Monitoring Does Not Justify The Statute Under Review.

Appellants' contention that the statute is necessary to allow effective drug monitoring is equally specious. Monitoring is the practice of keeping a record of the drugs purchased by customers. This practice can benefit customers by allowing pharmacists to detect the use of antagonistic drugs, but can also benefit the pharmacists by providing them with a direct mailing list to aid in advertising their non-prescription products, and by cutting paperwork for billing, insurance, and tax purposes. (Stip. 30-32; App. 16-17).

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20 (continued)
defendants that an affirmance of the decision below will mean that state-enforced prohibitions on advertising by professionals will be subject to the same kind of First Amendment scrutiny which is being undertaken in this case. That does not mean, however, that any – let alone all – such prohibitions will automatically be stricken down. The result in each case will depend upon several factors including: the nature of the information being disseminated (what is the public's interest in receiving such information, and is the information factual or primarily self-laudatory); the nature of the state interest asserted to support the prohibition (is the interest compelling or very weak); and the alternative means available to the state to achieve its purpose (how restrictive is the prohibition and what alternative means of regulation are available). These questions can only be answered in the context of a particular case after the parties have had an opportunity, as they did here, to establish the relevant facts on the record. Accordingly, an affirmance of the decision below will provide only the mode of analysis, not the result, with respect to future actions involving other statutes limiting the dissemination of other types of information.

Despite these potential benefits, many pharmacists do not monitor their customers' drug use.[21] There appear to be several reasons for this. First, because it is the physician's responsibility to see that patients do not take antagonistic drugs, the failure of pharmacists to monitor does not endanger the health of customers. (Stip. 35 & 36; App. 17).[22] Second, monitoring is likely to be ineffective because prescription drugs can be antagonistic to non-prescription drugs, and to foods and drinks which are not included on prescription records by those pharmacists who do monitor. (Stip. 33 & 34; App. 16-17). In addition, many people patronize more than one pharmacy because of convenience and other factors, thereby making it difficult for a pharmacist to keep comprehensive drug-use records. (Stip. 40; App. 18). Also, the effectiveness of monitoring is reduced because many people move without taking their prescription records with them. (Stip. 37-39; App. 17-18). The fact that many pharmacists do not monitor their customers' drug use, combined with the fact that people already patronize many different pharmacies, reveals that the protection of monitoring does not justify

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21 In *Patterson Drug Co. v. Kingery, supra,* the court recognized that only a minority of pharmacists monitor customers' drug use. 350 F.Supp. at 824. In addition, on page 3 of appellants' Opening Brief On The Merits in the district court, appellants themselves cited statistics showing that in Northern Virginia only 9 of 129, or 7% of the pharmacists surveyed, monitored drug use, and even in Richmond, Virginia, only 38% of the pharmacists did so. See also *Pennsylvania Board of Pharmacy v. Pastor,* 441 Pa. 186, 197, 272 A.2d 487, 493 (1971), where the court found monitoring to be "infrequent" and "not completely effective."

22 *See also* testimony of Dr. Sidney Wolfe, paragraphs 1 & 2, (App. 51), and testimony of Myron D. Winkelman, paragraph 3. (App. 49).

a statutory prohibition on the dissemination of drug price information merely because consumers might change pharmacies once they are given comparative price information.[23]

It is clear that appellants' reliance on monitoring to support the statute is a mere rationalization rather than a justification. There is not a shred of evidence in the

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23 Several state courts have emphatically rejected the monitoring justification in striking down statutes such as the one here at issue as violative of state Constitutions. For example, in *Pennsylvania Board of Pharmacy v. Pastor, supra*, 441 Pa. at 196-197, 272 A.2d at 493, the Pennsylvania Supreme Court invalidated a price advertising prohibition on dangerous or narcotic drugs in spite of the offered monitoring justification. Moreover, in *Florida Board of Pharmacy v. Webb's City, Inc.*, 219 So.2d 681 (Fla. 1969) and *Stadnik v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962) a similar Florida statute was invalidated. *But see Supermarkets Gen. Corp. v. Sills*, 98 N.J. Super. 326, 225 A.2d 728 (1966).

In striking down a Maryland drug price prohibition statute, the Court of Appeals of Maryland also rejected the monitoring argument, stating:

> Similarly, here no evidence was produced "to indicate the extent, if any to which pharmacists monitor prescriptions." We strongly suspect that monitoring, which may have been common in the past, hardly exists today. The President of the Board disclosed unfamiliarity with this term when first asked to define it. Given the diversification of modern retailing practices and the mobility of our society, it is quite likely that the physician is better able to monitor the possible ingestion of antagonistic drugs than the pharmacist. Therefore, in this context, we too are unpersuaded that the legislative means employed have a "real or substantial relation" to the objects for which they are allegedly designed. *Maryland Board of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 112, 311 A.2d 242, 247 (1973).

record indicating that the Virginia legislature even knew what monitoring was when it enacted section 54-524.35(3) of the Virginia Code.[24] Appellants claim that the indirect encouragement of monitoring is so important that it outweighs appellees' First Amendment rights. However, nowhere in the Codes of Ethics of the American Pharmaceutical Association or the Virginia Pharmaceutical Association, or in the appellants' regulations is there any requirement that pharmacists maintain customer prescription records. Although the Virginia Pharmaceutical Association actively lobbied for the Virginia ban on drug price advertising, neither it nor the State Board of Pharmacy has ever urged legislation that would require monitoring. (Stip. 42-44 & 49; App. 18-20). To uphold this statute as a legitimate effort to encourage monitoring would be to make a mockery of the First Amendment. If Virginia truly wishes to encourage monitoring by its pharmacists, it must do so with legislation reasonably related to that end which does not ignore the First Amendment rights of consumers to receive drug price information.

C. There Is No Other Justification For The Statute Under Review.

There is no meaningful relationship between the prohibition of prescription drug price advertising in Virginia and the suggested justifications for the statute offered by

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24 This distinguishes the present case from cases like *Weinberger v. Salfi*, ___ U.S. ___, 43 U.S.L.W. 4985, 4993-96 (June 26, 1975), and *Weinberger v. Wiesenfeld*, ___ U.S. ___, 95 S.Ct. 1225, 1233-36 (1975), where there was clear legislative history that established that Congress' purposes were in fact those being offered to sustain the statutes under review.

appellants. In addition, none of the circumstances which have caused this Court to uphold the regulation of commercial speech in other contexts applies here. For example, in *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), and in *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), regulation of speech was upheld because it fostered activities which the government had prohibited. In *Pittsburgh Press*, the ordinance being reviewed prohibited sex classification in newspaper want-ads as part of a legislative program that made it illegal to discriminate on the basis of sex in employment. Likewise, in *Hunter*, racial classifications in newspaper advertisements offering apartment rentals were prohibited because the underlying activity – racial discrimination in housing – was illegal. Here, however, the underlying activity is the purchase of prescription drugs by patients who have been told to use those drugs by their physicians. This activity is certainly not illegal, and the State cannot legitimately discourage consumers from making purchases upon the advice of a licensed physician.

Appellants have not contended that the State could totally prevent the dissemination of drug price information to consumers so that drug prices would not be revealed until after a sale was consummated. Appellants' position is that while consumers have a right to receive drug price information, the State can legitimately make access to it difficult and inconvenient. If, as all parties agree, consumers have a right to know the prices of the drugs that they purchase, there is no reason for making accurate price information difficult to obtain. This would make sense only if the State desired to discourage consumers from purchasing the drugs prescribed for them, an intent

which, presumably, was not that of the Virginia legislature.

The present case also differs from the situation presented in cases such as *New York State Broadcasters Ass'n. v. United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Capital Broadcasting Co. v. Acting Attorney General*, 333 F.Supp. 582 (D.D.C. 1971)(three-judge court), *aff'd*, 405 U.S. 1000 (1972); and *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom., Tobacco Institute, Inc. v. F.C.C.*, 396 U.S. 842 (1969). Appellants argue that these cases authorize the State to discourage the dissemination of price information even though the underlying activity of purchasing drugs is legal. (D.Br. 12). Each of these cases, however, involved regulation of the electronic media, where one must be licensed to use the airwaves that are owned by the public. *Capital Broadcasting, supra*, 333 F.Supp. at 586. These cases simply recognize that "[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest." *Id.* at 584. *See also Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 386-90 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-20, 226-27 (1943). *Compare Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Moreover, in *Capital Broadcasting* and *Banzhaf*, the federal government sought to protect the public health by reducing smoking. To achieve that end, the government tried to eliminate the pervasive incentive to smoke created by radio and television advertising. Those cases stand for the proposition that it is constitutional to attempt to discourage smoking by regulating cigarette advertising, without prohibiting smoking altogether, because smoking is a recognized detriment to the public health which the government

need not attempt to eradicate completely. *See Williamson v. Lee Optical of Oklahoma, Inc., supra,* 348 U.S. at 487-88. Likewise, in *New York State Broadcasters Ass'n. v. United States,* Congress prohibited use of publicly owned airwaves for advertising which promoted lotteries. Congress viewed gambling as undesirable and tried to discourage it by foreclosing use of federally regulated media for the promotion of lotteries.[25] Here, however, use of prescription drugs under a doctor's direction is not even arguably a detriment to the public health or welfare, and Virginia has never sought to discourage prescription drug purchases. Therefore, the State cannot justify a prohibition on drug price advertising by asserting any interest in discouraging the purchase of prescription drugs.

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[25] While the Second Circuit in *New York State Broadcasters* upheld the prohibition on using the electronic communications media to promote lotteries, the Third Circuit, in a unanimous *en banc* decision in *New Jersey State Lottery Comm. v. United States,* 491 F.2d 219 (1974), held the prohibition to be unconstitutional as a violation of the First Amendment. Although this Court granted certiorari in the New Jersey case to resolve the apparent conflict between Circuits, *United States v. New Jersey State Lottery Comm.*, 417 U.S. 907 (1974), that case was remanded to consider whether a change in the statutory prohibition to allow some promotion of state sponsored lotteries rendered the case moot. *United States v. New Jersey State Lottery Comm.*, ___ U.S. ___ , 95 S.Ct. 941 (1975). On July 14, 1975, the Third Circuit in an *en banc,* per curiam opinion held that the action was not moot in light of the statutory change. *New Jersey State Lottery Comm. v. United States,* ___ F.2d ___, (No. 72-1878).

CONCLUSION

Appellees and all other consumers have a pressing need for drug price information and have a First Amendment right to receive that information in a useful form. Access to drug price information will enable each consumer to shop for low prices and will benefit the public generally by reviving economic competition in the multi-billion dollar retail drug industry, thereby lowering retail drug prices. The only purpose served by the statute under review is the suppression of such competition. This is not a legitimate state interest and does not outweigh appellees' First Amendment interests. Appellants offer no plausible justifications for the statute which even begin to approach the compelling state interest that is necessary to override appellees' First Amendment rights. All of the relevant considerations point to the same conclusion; section 54-524.35(3) of the Virginia Code must be invalidated as offensive to the First Amendment of the Constitution.

Respectfully submitted,

ALAN B. MORRISON
GIRARDEAU A. SPANN
Suite 700 - 2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Appellees

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, ET AL.,
Appellants,

vs.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMICUS CURIAE

GILBERT H. WEIL,
WEIL, LEE & BERGIN,
60 East 42nd Street,
New York, New York 10017,
(212) 687-8573,
Attorney for Amicus Curiae.

PHILIP B. KURLAND,
ALAN L. UNIKEL,
ROTHSCHILD, BARRY & MYERS,
Two First National Plaza,
Chicago, Illinois 60603,
(312) 372-2345,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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BRIEF FOR ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMICUS CURIAE

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

For the reasons hereinafter stated, the Association of National Advertisers, Inc., *amicus curiae*, respectfully submits that the judgment of the court below be affirmed.

INTEREST OF AMICUS CURIAE

The amicus curiae is an association of enterprises which utilize the advertising media for purposes of bringing information about their products and services to the attention of consumers and the public. The essence of this case is the question whether a governmental authority can freely censor such communications because of their commercial nature despite the First Amendment's assurance of freedom of speech and the press. It is plain, therefore, that the interests of the *amicus curiae* are directly at stake here. Any decision on the merits by this Court will have an important effect on *amicus curiae* and each of its members.

The appellants and appellees have consented to the filing of this brief and their letters of consent are filed in the Office of the Clerk.

ARGUMENT

"COMMERCIAL SPEECH" IS LIKE OTHER FORMS OF SPEECH. IT IS PROTECTED BY THE FIRST AMENDMENT AGAINST GOVERNMENTAL CENSORSHIP. THE GOVERNMENT MAY, THEREFORE, NEITHER PRESCRIBE NOR PROSCRIBE THE CONTENT OF SPEECH BECAUSE OF ITS COMMERCIAL NATURE.

The appellants' brief rests on the simple proposition that all "commercial speech" lies outside the perimeters of the First Amendment. The strength of this proposition derives solely from its repetition. Its historical base is best described as shaky. As Supreme Court doctrine, it is best described as invalid. Because appellants' case rests totally on this myth, we submit that the appellants' case must fall with a demonstration of the erroneous nature of its major premise. Indeed, the judgment below should be affirmed on the basis of this Court's recent decision in *Bigelow* v. *Virginia*, 43 U. S. L. W. 4734, 4739 (16 June 1975), where this Court said: "We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest."

I. Valentine v. Chrestenson Did Not Put "Commercial Speech" Outside the Protection of the First Amendment.

The "mere commercial speech" label, on which some courts have rested judgment, has been said to have originated in *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942),* where the

* "Two decisions prior to the *Valentine Case* approved broad regulation of commercial advertising. *Fifth Ave. Coach Co.* v. *New York*, 221 U.S. 467, was decided long before *Stromberg* v. *California*, 283 U.S. 359, extended the application of the First Amendment to the States. In *Packer Corp.* v. *Utah*, 285 U.S. 105, the First Amendment problem was not raised. The extent to which such advertising

(Foonote continued on next page)

Court held that, because no one had a right to conduct business on city thoroughfares, no one had the right to distribute commercial handbills on city streets. In *Valentine*, after holding that the streets were open for dissemination of some information and opinion under Constitutional command, the Court said:

> We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be judged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct. [316 U.S. at 54-55.]

It is on this narrow ruling, that the First Amendment did not require access to the streets by a distributor of commercial handbills, that appellants' entire case of exclusion of commercial speech from the protections of the First Amendment is predicated. As this Court said in *Bigelow, supra,* at 4737, the opinion in *Valentine* cannot carry such a heavy burden:

> . . . the holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestenson* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.

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could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut,* 310 U.S. 296; *Martin* v. *Connecticut,* 310 U.S. 296; *Martin* v. *Struthers,* 319 U.S. 141; *Breard* v. *Alexandria,* 341 U.S. 622; *Roth* v. *United States,* 354 U.S. 476) has therefore never been authoritatively determined." *Cammarano* v. *United States,* 358 U.S. 498, 513 n.1 (1959). (Douglas, J., concurring.)

As Mr. Justice Douglas, who was a member of the Court when the *Valentine* case was decided, has told us: "The ruling was casual, almost off hand. And it has not survived reflection." *Cammarano* v. *United States,* 358 U.S. 498, 514 (1959). But one need not have participated in the framing of the *Valentine* decision to see that it affords no rationalization but only a conclusion to justify its decision.

The fact that the Court tolerates a ban on a certain category of speech in a certain kind of place has not elsewhere been used to conclude that the kind of speech involved is totally beyond the protection of the First Amendment, but only to say that that kind of speech is not protected in that kind of place. See, *e.g., Cox* v. *Louisiana,* 379 U.S. 536, 559 (1965); *Adderley* v. *Florida,* 385 U.S. 39 (1966); *Lloyd* v. *Tanner,* 407 U.S. 551 (1972); *Kleindienst* v. *Mandel,* 407 U.S. 753 (1972).

No reason has been suggested why a time, place, or manner regulation, such as involved in *Valentine,* should be precedent for the total censorship of information that is the concern of this case. Whatever *Valentine* may have meant, it is clear that it did not say that the content of the message was subject to governmental censorship. The decision there was concerned not with banning what was said, but only with limiting the place where it could be said and the manner in which it was said. Surely Mr. Chrestenson was free to advertise his wares on his own property, in newspapers, or on the radio. What appellants have sought to do here, as distinguished from *Valentine,* is to ban the substance of the communication and there is no warrant in the law for that.

Valentine, in principle if not in its conclusion, may be justified by the same doctrine that is applied to other categories of speech clearly incorporated in the First Amendment. Mr.

Justice Marshall stated that proposition in *Grayned* v. *Rockford*, 408 U.S. 104, 116-17 (1972):

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

II. Any Two-Tiered Theory of the First Amendment That Placed Categories of Speech Beyond the Ken of the Amendment Was Invalidated by New York Times v. Sullivan.

Perhaps the most important point to be made with reference to an evaluation of *Valentine* is that it was decided at the beginning of the development of First Amendment doctrine by this Court, and long before *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), restructured this Court's First Amendment theory. Before *New York Times*, the Court had spoken as though there were some categories of speech totally beneath or beyond protection of the First Amendment. Thus, shortly before the decision in *Valentine*, the Court, in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942), wrote:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words.

Accurately reading the Court's decision in *New York Times* for its effect on the two-tier theory thus stated in *Chaplinsky*,

the late Professor Harry Kalven, Jr., wrote, in *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 Supreme Court Review 191, 217:

> In this instance, however, the point is not passed over in silence. The plaintiffs had urged as a principal argument in defense of the judgment that libel was not constitutionally protected. The Court confronted the issue directly and disposed of it firmly: . . . "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." [367 U.S. at 269.] No matter how speech is classified, there must still be First Amendment consideration and review. No category of speech is any longer beneath the protection of the First Amendment.

The *New York Times* case itself removed "the libelous" from the area of "the limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." And it no longer suffices to label speech "lewd and obscene," or "profane," or "insulting or fighting words" to take it out of the protection of the First Amendment. See, *e.g.*, *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Cohen* v. *California*, 403 U.S. 215 (1971); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Rosenfield* v. *New Jersey*, 408 U.S. 901 (1972); *Lewis* v. *City of New Orleans*, 408 U.S. 913 (1972); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972). It remained only for this Court to recognize that "commercial speech" is not a label that suffices to exclude the speech from the proper realm of the Free Speech Clause of the First Amendment. This Court did exactly that in *Bigelow* v. *Virginia*, *supra*, at 4739, where it said:

> The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S., at 429. Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. . . .

Regulation of "commercial speech", like regulation of other categories of speech, "can claim no talismanic immunity from constitutional limitation. It must be measured by standards that satisfy the First Amendment." *New York Times* v. *Sullivan*, 367 U.S. at 269.

III. There Is No Rational Basis Offered to Sustain the Argument that "Commercial Speech" Is Not "Speech" Within the Meaning of the First Amendment.

It was in a "commercial" context, that of a labor dispute, that this Court announced the proposition: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). Certainly it cannot be said that information about the prices of prescription drugs does not fall within this proposition.

The fact is that, in our society, the individual exercises his personal preferences, has greater control over his own behavior, in the area of commercial transactions than in any other sphere of his life. More people are directly concerned with "commercial speech" than with any other category of speech. This cannot be a reason for excluding such speech from the protection of the First Amendment. As Mr. Justice Douglas said in his dissent from denial of certiorari in *Dun & Bradstreet* v. *Grove*, 404 U.S. 898, 905-06 (1971):

> The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. W. Baumol, Economic Theory and Operations Analysis 249-256 (1961); A. Braff, Microeconomic Analysis, 259-276 (1969); A. Dorfman, Prices and Markets, 128-136 (3d ed. 1967).

When one recognizes as this Court must, that depictions and advocacy of lawlessness and violence in comic books and on television, that the vivid verbal and pictorial portrayals of normal and abnormal sexual behavior in magazines and motion pictures, all fall within the protection of the First Amendment, it must be seen that advertising, *i.e.*, commercial speech, both on an absolute and on a comparative basis, has a firm claim on First Amendment coverage. For, as Mr. Justice Harlan said in *F. T. C.* v. *Procter & Gamble Co.*, 388 U.S. 568, 603-04 (1967) (concurring opinion):

> Proper advertising serves a legitimate and important purpose in the market by educating the consumer as to available alternatives. This process contributes to consumer demand being developed to the point at which economies of scale can be realized in production. The advertiser's brand name may also be an assurance of quality, and the value of this benefit is demonstrated by the willingness of consumers to pay a premium for advertised brands. Undeniably advertising may sometimes be used to create irrational brand preferences and mislead consumers as to the actual differences between products, but it is very difficult to discover at what point advertising ceases to be an aspect of healthy competition. See Bork, Contrasts in Antitrust Theory: I, 65 Col. L. Rev. 401, 411, n.11. It is not the Commission's function to decide which lawful elements of the "product" offered the consumer should be considered useful and which should be considered the symptoms of industrial "sickness." It is the consumer who must make that election through the exercise of his purchasing power. . . .

The reasons for including "commercial speech" within the confines of the First Amendment are, thus, clearly stated. The opinions of this Court certainly do not suggest any reason for its categorical exclusion. Mr. Justice Holmes reminded us, when the theory of the First Amendment was being framed, "that the ultimate good desired is better reached by free trade in ideas, — that the best test of truth is the power of the thought to get

itself accepted in the competition of the market." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919). The argument for freedom of the marketplace of ideas is equally applicable to freedom for the ideas of the marketplace.

IV. This Court Has Recognized Exceptions to First Amendment Protections Against Government Regulation of Speech, Including "Commercial Speech." None of These Exceptions Is Applicable Here.

Even that kind of speech which is clearly included with the First Amendment's protection may take a form that would subject it to government regulation. Thus, as the Court said in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969):

> These later decisions have furnished the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Where the speech in issue is so closely brigaded with "imminent lawless action" it may fall outside the protection of the First Amendment. That is, in an economic context, the lesson of the labor picketing cases. See, *e.g.*, *Local Union No. 10, A. F. of L.* v. *Graham*, 345 U.S. 192 (1953); *Building Service Employees Union, Local No. 262* v. *Gazzam*, 339 U.S. 532 (1950); *Hughes* v. *Superior Court*, 339 U.S. 460 (1950); *Cole* v. *Arkansas*, 338 U.S. 345 (1949); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *International Union, U. A. W.* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

This, too, in the more immediate context of "commercial speech," is the lesson of *Pittsburgh Press* v. *Human Relations Commission*, 413 U.S. 376, 388 (1973), where the Court said:

> Insisting that the exchange of information is as important in the commercial realm as in any other, the newspaper here would have us abrogate the distinction between commercial and other speech.

> Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the ordinance. [Emphasis in original.]

The time, place, and manner of speech, but not its content may also be subject to injunction. See cases cited *supra* at p. 5.

And, speech may be incidentally restrained in order for government to effect other ends that are within its constitutional authority. The standard here was set out in *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968), in these terms:

> This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

The case before this Court falls outside all these exceptions. There is no illegal action coupled with the expression of information about pharmaceutical products, to wit, their price. The regulation is not concerned with time, place, or manner, but with the content of the speech itself. It is not a regulation with an incidental effect on speech, but one of direct censorship of speech. Nor is there any showing that the publication of prices of pharmaceutical wares would have any adverse effect on "the quality of [pharmaceutical] services within Viriginia." *Bigelow, supra*, at 4739.

It follows that the publication of the price data at issue herein may not constitutionally be inhibited by state law without falling afoul of the principles of the First Amendment long espoused and elaborated by this Court. Unless the Court is prepared to revert to the proposition that the invocation of the shibboleth "commercial speech" is sufficient to afford the State "talismanic immunity from constitutional limitation," 367 U.S. at 269, the judgment below should be affirmed.

CONCLUSION

"Commercial speech" like other forms of speech is entitled to the protections of the First Amendment. The First Amendment requires the invalidation of the law in question here which consists of direct and total censorship of communications that would publish the price of prescription drugs. The judgment of the court below should, therefore, be affirmed.

Respectfully submitted,

GILBERT H. WEIL,
WEIL, LEE & BERGIN,
60 East 42nd Street,
New York, New York 10017,
(212) 687-8573,
Attorney for Amicus Curiae.

PHILIP B. KURLAND,
ALAN L. UNIKEL,
ROTHSCHILD, BARRY & MYERS,
Two First National Plaza,
Chicago, Illinois 60603,
(312) 372-2345,
Of Counsel.

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In the
Supreme Court of the United States

October Term, 1974

No. 74-895

VIRGINIA STATE BOARD OF
PHARMACY, ET AL.,
APPELLANTS,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL,
INC., ET AL.,
APPELLEES.

**Appeal From The United States District Court
For The Eastern District Of Virginia**

BRIEF FOR OSCO DRUG, INC., AMICUS CURIAE, IN SUPPORT OF APPELLEES

Harold Rosenwald
185 Devonshire Street
Boston, Massachusetts 02110
Counsel for Osco Drug, Inc.

July, 1975

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Appeal From The United States District Court
For The Eastern District Of Virginia

BRIEF FOR OSCO DRUG, INC., AMICUS CURIAE, IN SUPPORT OF APPELLEES

Interest of Amicus Curiae

This *amicus curiae* brief is filed, with the consent of counsel for the parties, by Osco Drug, Inc. ("Osco"), an Illinois corporation, supporting Appellees and urging the Court to affirm the decision of the District Court.

Osco, a wholly-owned subsidiary of Jewel Companies, Inc., a New York corporation, owns and operates more than 200 retail drug stores in 17 states. Since September, 1974, Osco has engaged in a program to advertise its prices for prescription drugs. Pursuant to that program, Osco has published and distributed a pamphlet stating the prices of most prescription drugs, and has advertised in newspapers the availability of the pamphlet and, in some cases, the names and prices of some prescription drugs.

Because of Osco's advertising of prescription drug prices in newspapers in the Boston area, the Massachusetts Board of Registration in Pharmacy ("Mass. Board") has instituted disciplinary proceedings against the pharmacist managers of the drug business of Osco's drug stores in Massachusetts, charging them with violations of Mass. General Laws, c. 94C, §46 and Item 16 of Rule 49 of the Mass. Board's Rules and Regulations, both of which prohibit the advertising of prescription drug prices. These proceedings could result in the revocation or suspension of the registrations of said pharmacists and of the permits to keep open said drug stores.

During the pendency of the proceedings before the Mass. Board, the Massachusetts Public Interest Research Group, Inc. ("PIRG") brought an action against the Mass. Board in the United States District Court for the District of Massachusetts, seeking a declaratory judgment to the effect that said Mass. General Laws, c. 94C, §46 and said Item 16 of Rule 49 are in violation of the First and Fourteenth Amendments. A three-judge Court has been convened to hear the case. Osco has filed an *amicus curiae* brief in support of the plaintiff. ***Massachusetts Public Interest Research Group, Inc., et al.*** **v. *Massachusetts State Board of Registration in Pharmacy, et al.*, C.A. No. 74-5221-C (D. Mass., 1974).**

The proceedings before the Mass. Board and in the *PIRG* case have been stayed until the present case is decided by this Court. Accordingly, Osco has a direct and immediate interest in the instant case, since the decision of this Court will control the decisions in the proceedings in Massachusetts, and will determine the constitutionality of laws and regulations prohibiting the advertising of drug prices in other states where Osco operates drug stores.

Question Presented

Whether the First Amendment is violated by a statute which provides that a pharmacist is guilty of "unprofessional conduct", punishable by revocation of his license, if he advertises the price for any drugs which may be dispensed only by prescription.[1]

Statement of the Case

The District Court held that Va. Code § 54-524.35(3) (1974) is in violation of the First Amendment. The Court distinguished *Patterson Drug Company* v. *Kingery,* 305 F. Supp. 821 (W.D. Va., 1969), holding constitutional the virtually identical predecessor statute, upon the ground that *Patterson* was an action brought by pharmacist sellers of drugs, whereas the present action was brought by consumers of drugs.

The instant case cannot be reconciled with *Patterson.* The decision in *Patterson* does not rest on any lack of standing of pharmacists to attack the statute but on the

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[1] The "question presented" in Appellants' brief (p. 2) assumes the validity of the statute, which we consider to be in issue.

merits. A statute cannot be constitutional when challenged by pharmacists and unconstitutional when challenged by consumers. Moreover, the right to know, upheld in the instant case, cannot be protected unless the correlative right to tell is equally protected.

It is our position that the instant case was correctly decided and that the *Patterson* decision is erroneous.

Summary of Argument

Freedom of speech and of the press are fundamental rights essential to the existence of a free society. Repeated decisions of this Court have protected those rights against invasion by the Federal and State governments, except for speech which is lewd and obscene, profane, libelous or insulting.

"Commercial speech might well be called the stepchild of the first amendment." Developments — Deceptive Advertising, 80 Harv. L. Rev. 1005, 1027 (1967). Undefined and unexplained limitations upon the protection of commercial speech were established by *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). That decision has been widely criticised and questioned in legal periodicals and by members of this Court, and has very recently been clarified in *Bigelow* v. *Commonwealth of Virginia,* 43 U.S.L.W. 4734 (U.S., June 16, 1975).

Commercial advertising serves essential social purposes in affording to consumers information required to make prudent choices among competing products. Such information may be more important to the majority of people than the political and philosophical opinions which traditionally have been more fully protected under the First Amendment.

Pittsburgh Press Co. v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), seemed to reject

any rigid exclusion of commercial speech from the protection of the Amendment and to require that the validity of any restriction of commercial speech be determined by balancing the First Amendment interests against the governmental interest in regulation. The requirement of balancing such competing interests has now been firmly established by *Bigelow* v. *Commonwealth of Virginia, supra.*

Under such a test in the present case, the First Amendment interests surely prevail. Those interests stem from the great need for information about drug prices in the light of wide variations in such prices, the impact of such price variations and of high drug prices upon the elderly, and the mitigating effect of advertising and consequent free competition upon unreasonably differing and excessive prices. The regulatory interests consist of questionable claims, *inter alia,* that price advertising will increase the use of drugs, that such advertising will encourage consumers to patronize more than one drug store and thus interfere with so-called "monitoring" of patients' drug consumption so as to avoid the use of antagonistic drugs, and that increased competition caused by advertising will encourage small retailers to buy excessive supplies of drugs to obtain quantity discounts and thus result in the deterioration of such drugs on the shelves of pharmacists.

Appellants' reliance upon *North Dakota Pharmacy Ed.* v. *Snyder's Stores,* 414 U.S. 156 (1973), *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955) and *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935) is misplaced. Those cases arose under the Fourteenth Amendment, and no issue under the First Amendment was decided. Moreover, although *Williamson* and *Semler* hold that the Fourteenth Amendment does not prohibit regulation of advertising of prices for professional services in the interest of public health, the statute here involved does not regulate the

professional conduct of pharmacists but only prohibits the advertisement of prices of commodities sold by pharmacists.

Finally, the contention that any First Amendment right to advertise drug prices is inapplicable because alternative means of securing price information are available is without merit, since the existence of alternative means of securing information does not nullify the right to receive such information in another reasonable manner, and the alternative means of securing the desired information are wholly inadequate.

Argument

A. The Virginia Statute Violates the First Amendment.

1. *Scope of the Amendment.*

The freedoms guaranteed by the First Amendment are "secured to all persons by the Fourteenth against abridgement by a state." *Schneider* v. *State,* 308 U.S. 147, 160 (1939) and cases cited. In *Schneider,* the Court stated at page 161:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."

The exercise of such rights has been upheld against restrictive or prohibitory legislation in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) (right to receive foreign mailings of "Communist political propaganda" without interference); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963) (right peacefully to assemble and express grievances); *Martin* v. *Struthers,* 319 U.S. 141 (1943) (right to deliver religious handbills to private homes); *Lovell* v. *Griffin,* 303 U.S. 444 (1938) (right to distribute literature without obtaining a license); and *Schneider* v. *State, supra* (right to distribute literature in public streets).

Nevertheless, the protections afforded to freedom of speech and of the press are not absolute. There is no protection for speech which is lewd and obscene, profane, or libelous, nor for "insulting or 'fighting' words." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-572 (1942). See, also: *Ginzburg* v. *United States,* 383 U.S. 463 (1966); *Stromberg* v. *California,* 283 U.S. 359 (1931); *Gitlow* v. *New York,* 268 U.S. 652 (1925).

2. *Advertising of Drug Prices Is Entitled to First Amendment Protection Even Though Such Advertising Constitutes Commercial Speech.*

The doctrine that commercial speech is entitled only to limited protection under the First Amendment found its origin in *Valentine* v. *Chrestensen, supra.* Chrestensen distributed in the streets of New York City a handbill soliciting visitors to his submarine for an admission fee in violation of an ordinance prohibiting the distribution of "commercial and business advertising matter" upon the public streets. This Court held that the application of the ordinance to Chrestensen's activity did not violate the First Amendment. Reaffirming the doctrine that the gov-

ernment may not unduly burden or proscribe the communication of information and dissemination of opinion in the public streets, the Court held that "the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U.S. at 54.

Chrestensen has been the subject of much criticism and commentary. One member of this Court has said that the holding was "casual" and "has not survived reflection." Douglas J., concurring in *Cammarano* v. *United States,* 358 U.S. 498, 514 (1959), and dissenting from denial of certiorari in *Dun & Bradstreet* v. *Grove,* 404 U.S. 898, 904-905 (1971). See, also: *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 314-315 (1974) (Brennan, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* 413 U.S. at 393 (Burger, C.J., dissenting); *id.* at 398 (Douglas, J., dissenting); *id.* at 401 (Stewart, J., dissenting). It has been noted that in *Chrestensen* the Court did not define the scope of First Amendment protection, if any, given to "purely commercial advertising." Block, Commercial Speech — An End in Sight to Chrestensen?, 23 DePaul L. Rev. 1258, 1263 (1974). Moreover, the reach of the decision has been said to be limited by the circumstance that it involved "regulation that went not to substance, but the manner of distribution", that is, by handbills distributed in the public streets. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 George Washington L. Rev. 429, 448 (1971).

The basic dogma that commercial advertising is not entitled to the same First Amendment protection that is accorded to political, social and religious advocacy has never been explained by this Court. Developments — Deceptive Advertising, *supra,* 80 Harv. L. Rev. at 1027 (1967). There can be no doubt that such advertising serves essential social purposes both in providing information concerning familiar merchandise and in creating interests in new products. Redish, *op. cit. supra,* 39 George Washington L. Rev. at 432-433. "Advertising is a medium of information and persuasion, providing much of the day-to-day 'education' of the American public and facilitating the flexible allocation of resources necessary to a free enterprise economy." Developments — Deceptive Advertising, *supra,* 80 Harv. L. Rev. at 1027. Through such advertising the consumer is enabled to make a prudent choice among competing products. The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech, 50 Oregon L. Rev. 177, 188 (1971). Indeed, the free flow of economic information may be more important to the majority of people than the unrestricted communication of political, social or commercial opinions. Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1194 (1965).

In *New York Times Co.* v. *Sullivan,* 396 U.S. 254 (1964), this Court held that a paid political advertisement communicating information, expressing opinions and seeking financial support for an important social movement was not a "commercial" advertisement within the meaning of *Chrestensen,* and was entitled to First Amendment protection. The Court stated, at page 266: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." Similarly, in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), it was held that motion pictures fall within the Amendment, despite the contention (p. 501) that "their production, distribution, and exhibition is a large-scale business conducted for private profit." See, also: *Ginzburg* v. *United States, supra.* In any event it is now clear that the existence of a profit motive does not deprive speech of First Amendment protection. *Bigelow* v. *Commonwealth of Virginia, supra.*

Prior to *Bigelow,* decisions of the lower Federal courts accorded First Amendment protection to speech "transmitted in a commercial setting or for profit." *Atlanta Coop. News Project* v. *United States Postal Serv.,* 350 F. Supp. 234, 239 (N.D. Ga., 1972) (anticipating *Bigelow,* and holding invalid 18 U.S.C. § 1461 as applied to use of mails for advertisement giving information about procurement of abortions). See, also: *United States* v. *Pellegrino,* 467 F. (2d) 41 (C.A. 9, 1972) (reversing conviction for violation of 18 U.S.C. § 1461 in mailing advertisement of book concerning functions and characteristics of female sexual organs on grounds that advertisement was not obscene and was entitled to First Amendment protection).

3. *First Amendment Interests Should Be Balanced Against Interest in Regulation.*

In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* the Court clarified to some extent the position of commercial speech under the First Amendment. In that case an ordinance declared it unlawful for any employer to discriminate against any person with respect to hiring on account of sex, except for certain exempt jobs, or to publish any advertisement relating to employment, which indicated such discrimination, or for any person to aid in any such act. The Pittsburgh Press was found guilty of violating the ordinance by publishing help-wanted advertisements under captions indicating a sex preference for jobs that were not exempt.

This Court held that the ordinance, as applied, did not violate the First Amendment. Although the opinion characterized the advertisements as "classic examples of commercial speech", the decision rested on the ground that the advertisements encouraged discrimination in employment that was illegal under the ordinance. Thus, the Court

pointed out, at page 388: "Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance." In the present case, no illegal activity is promoted by advertising the retail price of prescription drugs. See *Terry* v. *California State Board of Pharmacy*, No. C-74-1091 RFP (SJ) (N.D. Cal., 1975).

In *Pittsburgh Press,* the Court rejected any notion, derived from *Chrestensen,* that there is an absolute exclusion of "purely commercial advertising" from the protection of the Amendment, and indicated that the extent of the protection of such advertising should be determined, where no illegality is involved, by balancing the First Amendment interests against the governmental interest in regulation. The Court stated at page 389:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."

See Block, *op. cit. supra,* 23 DePaul L. Rev. at 1261.

This balancing technique has been used where traditionally protected areas of speech have been subjected to regulation. In *Schneider* v. *State, supra,* the Court stated, 308 U.S. at 161:

> "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be

> insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

See, also: *Talley* v. *California,* 362 U.S. 60, 66 (1960) (concurring opinion of Harlan, J.).

Lower Federal courts, both before and after *Pittsburgh Press,* have balanced the opposing considerations in determining the validity of regulations of commercial speech. See *Hiett* v. *United States,* 415 F. (2d) 664 (C.A. 5, 1969) (social importance of information concerning marriage relation prevailed where statute broadly prohibited use of mails for information about securing foreign divorce and soliciting business for that purpose, and legislative purpose was limited to prevention of fraud in procurement of such divorces); *Barrick Realty, Incorporated* v. *City of Gary, Indiana,* 491 F. (2d) 161 (C.A. 7, 1974) (ordinance, designed to prevent "block-busting", prohibiting display of "For Sale" and similar signs on residential property, held valid on ground, among others, that municipal interests in restricting commercial activity in residential areas and in maintaining stable integrated neighborhoods outweighed interests in freedom of speech).

See, also: The First Amendment and Commercial Advertising: *Bigelow* v. *Commonwealth,* 60 Virginia L. Rev. 154 (1974).

The necessity of balancing the opposing interests where commercial advertising is involved has been firmly established by this Court in *Bigelow, supra.* There the Court stated, 43 U.S.L.W. at 4739:

> "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."

4. *First Amendment Interests Outweigh Governmental Interest in Regulating Advertising of Drug Prices.*

We come now to balance the First Amendment interests in advertising prescription drug prices against the State's interest, if any, in prohibiting such advertising.

a. *First Amendment Interests.*

The Court below found that annual expenditures for prescription drugs are vast, running into billions of dollars.[2] App. 4.[3] The Court also found, as stipulated by the parties, that the prices of identical drugs vary tremendously in Virginia. *Ibid.* Numerous surveys have established that such price differences are usual in other parts of the country. See Rosenthal, *op. cit. supra,* at H1881-H1882; Constitutional Law: A Statute Which Prohibits the Advertising of Prescription Drug Prices Is Unconstitutional,

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[2] "In 1971, for example, the Nation's prescribing practitioners ordered some 1,113,811,000 individual new or refilled prescriptions which consumers purchased in community pharmacies alone in the United States. For these drugs alone, the American public spent an estimated $4,367,381,000." Competitive Problems in the Drug Industry, Select Committee on Small Business, United States Senate, Subcommittee on Monopoly, 92d Cong. 2d Sess. (Nov. 2, 1972), p. 1. See, also: Rosenthal, Congressman Benjamin S., Retail Drug Price Competition, Cong. Rec., House, March 15, 1973, p. H1888; Douglas, The Pharmaceutical Industry and Generic Drugs, Financial Analysts Journal, Sept.-Oct. 1970, p. 113.

[3] The Appendix to Appellants' Jurisdictional Statement is cited as "App."; the Appendix filed with Appellants' brief, as "J.A."

37 Brooklyn L. Rev. 617, 626, n. 73 (1971); *Pennsylvania State Board of Pharmacy* v. *Pastor,* 441 Pa. 186, 272 A. (2d) 487, 494 (1971). Prices for the same drugs have been found to vary among different customers in the same drug store, and to be higher in poorer neighborhoods. Rosenthal, *op. cit. supra,* at H1883.

Such price variations are caused by the consumers' lack of information about drug prices. "The cost to the public of the lack of price competition is enormous." Research Paper and Policy Statement of the United States Department of Justice, etc., J.A. 21, 23.

The principal victims of differentials in drug prices and high drug prices are the elderly, those aged 65 or more. About 80 per cent of the elderly—as compared with 40 per cent of those under 65—suffer from one or more chronic diseases and conditions, many of which can be controlled or alleviated by drugs. In addition to their exceptional need for drugs, the elderly have the least ability to pay for them. See opinion below, App. 3-4; Task Force on Prescription Drugs, Second Interim Report and Recommendations, August 30, 1968, U. S. Department of Health, Education, and Welfare, at 5-7.

The advertising of prescription drug prices will mitigate price variations and, according to the Department of Justice, will result in lower prices. Research Paper, etc., *supra,* J.A., at 21-22. See, also: Prescription Drug Pricing in California—An Analysis of Statutory Causes and Effects, 49 Cal. L. Rev. 340, 347 (1961). Moreover, the advertising of prescription drug prices will afford to the consumer information that will assist him in choosing among competing sellers of drugs. Such information is especially important since the consumer is likely to be ill and elderly and to have an urgent need for the prescribed medicine, and, consequently, may find it difficult to shop for the best price. Retail Drug Advertising Bans are Bad Medicine for Consumers—Is there a Sherman Act Prescription?, 15 Arizona L. Rev. 117, 123 (1973). The poor are often unable to shop because of their lack of mobility and are required to pay the higher prices charged in low income neighborhoods. Rosenthal, *op. cit. supra,* at H1883.

In *Terry* v. *California State Board of Pharmacy, supra,* the Court stated:

> "In weighing the importance of the speech being expressed against the interests advanced by the state in the present case, we begin by observing that the information sought by the plaintiffs, simply the price charged for a given quantity of a given prescription drug, has been stipulated to be health-essential, and may in some cases even be life-essential, insofar as it may increase availability to low-income persons of medically necessary prescription drugs."

b. *Governmental Interests in Regulation.*

The Attorney General of Missouri, declaring invalid a proposed regulation prohibiting the advertising of prescription drugs, stated that "it is difficult to understand how the public welfare can be prejudiced by the dissemination of truthful information concerning the name, nature, and price of drugs which can be purchased only upon proper prescriptions." Fletcher, Market Restraints in the Retail Drug Industry (1961), at 232. Nevertheless, numerous reasons in support of restrictions on such advertising have been advanced with a considerable degree of consistency. See Fletcher, *op. cit. supra,* at 231-239.

It has been argued that the advertising of prescription drug prices would increase the use of such drugs. Research Paper, etc., J.A. 24. The Court below ruled that this contention was "wholly untenable, since the medicine is

controlled by prescriptions of physicians and so the sale of the drugs is not even at the druggists' will." App., p. 9. And in *Pennsylvania State Board of Pharmacy* v. *Pastor, supra,* the Court stated, 272 A. (2d) at 492:

> "Therefore, to urge that allowing price advertisements of prescription drugs would increase the use of such drugs, one must assume either a) that patients are able to pressure doctors into prescribing drugs for them, or b) that pharmacists are willing to risk selling such drugs without a prescription. We think neither assumption valid."

It is usually contended that price advertising encourages price shopping and the consequent patronizing of more than one drug store, and that as a result it may be impossible for a pharmacist to "monitor" the patient's use of drugs by the maintenance of family records and thus enable the patient to avoid allergic reactions and the simultaneous use of antagonistic drugs. Research Paper, etc., J.A. 24. The Court in the *Patterson* case stated that monitoring is "a benefit to the public," although conceding that probably only a minority of pharmacists systematically monitor prescriptions and that "monitoring is not completely effective because of the mobility of customers and the availability of nonprescription drugs which may be antagonistic." *Patterson Drug Company* v. *Kingery, supra,* 305 F.Supp. at 824. *Cf. Supermarkets General Corp.* v. *Sills,* 225 A. (2d) 728, 737 (N.J. Super., 1966).

In the *Pastor* case, the Court, rejecting the argument, pointed out that the state had produced no evidence as to the extent, if any, to which pharmacists monitor prescriptions, and that the courts which have accepted this rationale have conceded that monitoring is "infrequent" and "not completely effective," and stated, 272 A. (2d) at 493:

> "Further, it is primarily the physician's duty to be certain that he is not prescribing drugs antagonistic to those already being taken by his patient. Indeed, it would appear that if the Legislature was in fact concerned about the prescribing of antagonistic drugs, it would have chosen a route more direct than simply prohibiting the advertising of their prices."

See, also: *Maryland Board of Pharmacy* v. *Sav-A-Lot, Inc.,* 311 A. (2d) 242, 247 (Md., 1973).

It was also contended in *Pastor* that the advertising of drug prices "may encourage small retailers to buy unusually large quantities of drugs, so as to obtain a lesser price," and "[a]s a result, drugs may stay on the pharmacist's shelf for an extended period of time during which they may deteriorate." 272 A. (2d) at 491. The Court, noting that in Pennsylvania (as elsewhere) the sale of deteriorated drugs is prohibited, stated, 272 A. (2d) at 494:

> "Nor can it be said that prohibiting advertising of drug prices bears a substantial relation to the third goal asserted—prevention of deterioration of drugs. As in the case of the monitoring function, the means chosen are so far removed from the goal suggested that one must strain to find the relation."

In addition to the foregoing reasons for restrictions on price advertising, a number of equally specious grounds have been urged, allegedly in the interest of the public health. See Fletcher, *op. cit. supra,* at 234-235. All of these reasons lead to the conclusion that the real reason for such restrictions is the suppression of competition. Thus, in *Stadnik* v. *Shell's City, Inc.,* 140 So. (2d) 871 (Fla., 1962), the Court held invalid a Florida regulation prohibiting the advertising of drug prices and stated at page 875:

> "In actuality, the rule [prohibiting advertising] has more resemblance to an economic regulation prohibiting price competition in the prescription drug business than it does to a regulation guarding the public health."

See, also: Retail Drug Advertising Bans, etc., *supra,* 15 Arizona L. Rev. at 125.

Recently the Federal Trade Commission has initiated a proceeding for the promulgation of a trade regulation rule describing as an unfair practice any restriction upon the "disclosure by any retail seller of accurate price information regarding prescription drugs" through "advertisements in print media, broadcast media, or in any other way." Federal Register, Vol. 40, No. 108, pp. 24031 *et seq.*, June 4, 1975. In a supporting statement it is said:

> "The Commission has reason to believe that:
>
> . . . . .
>
> "e. The lack of price information is not vital for any state interest in the public health, safety, and welfare, and the alleged justifications for non-disclosure of price information, such as the alleged possibilities that increased price disclosures may (1) lead to drug abuse, (2) lessen the effectiveness of monitoring by pharmacists to prevent drug interactions, (3) demean the profession of pharmacy, and (4) lead to the dispensing of stale or adulterated drugs, are without significant merit and are outweighed by the probable benefits to consumers from more price information." *Id.* at 24032.

It must be concluded that the social values to be derived from the advertising of prescription drug prices greatly outweigh the dubious governmental interests in prohibiting such advertising. See ***Terry*** **v.** ***California State Board of Pharmacy, supra.***

B. Appellants' Arguments in Support of the Statute Are Without Merit.

Insisting that this is a First Amendment and not a Fourteenth Amendment case (Appellants' brief, p. 4), appellants nevertheless argue on Fourteenth Amendment grounds. Thus they contend, on pages 16-17 of their brief, that the Court below "considered the advertising proscription economically unsound and substituted its wisdom for that of the Virginia legislature", and that its decision is, accordingly, in conflict with *North Dakota Pharmacy Bd.* v. *Snyder's Stores, supra.*

In the economic due process cases this Court refuses to "balance the advantages and disadvantages" of legislation and resolves all doubts in favor of the "rational relation" of the chosen means to the legislative objective. *Williamson* v. *Lee Optical Co., supra,* 348 U.S. at 487, 491 (1955). However, in *North Dakota Pharmacy Bd.,* the Court, quoting from its opinion in *Lincoln Union* v. *Northwestern Co.,* 335 U.S. 525 (1949), made it clear that states may freely legislate in the economic area only "so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." 414 U.S. at 165. See, also: *Ferguson* v. *Skrupa,* 372 U.S. 726, 729 (1963). The Court below based its decision upon the "specific federal constitutional prohibition" of the First Amendment (App. 7), and used the balancing technique which we have discussed. On the other hand, the Court in *Patterson, supra,* erred in its reliance upon the due process cases and its consequent refusal to give any weight to the anti-competitive and other economic effects of the statute. 305 F.Supp. at 825-826.

Appellants argue, on pages 10 *et seq.* of their brief, that the statute before the Court is a regulation "in the interest of public health" and that advertising "in the health field"

may be prohibited in accordance with *Semler* v. *Dental Examiners, supra,* and *Williamson* v. *Lee Optical Co., supra.*

In *Semler* an Oregon statute prohibited dentists, *inter alia,* from "advertising professional superiority", advertising "prices for professional service", or "advertising to guarantee any dental service, or to perform any dental operation painlessly." Holding that the statute did not violate the Fourteenth Amendment, this Court stated, 294 U.S. at 612:

> "The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards from those which are traditional in the market place."

In *Williamson,* the Court held that the Fourteenth Amendment was not violated by the provision of a statute which made it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances." Reversing the lower Court's decision that this provision was unconstitutional because of its prohibition against soliciting the sale of eyeglass frames, the Court ruled that such frames are not used in isolation but with lenses and, accordingly, may be regulated to the same extent as lenses, which "enter the field of health." 348 U.S. at 490. The Court concluded, *ibid.:*

> "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

Neither in *Semler* nor in *Williamson* was any issue raised under the First Amendment. In *Head* v. *New Mexico Board,*

374 U.S. 424 (1963), the contention that a statute, prohibiting the advertising of prices of eyeglasses, lenses, frames or mountings, constituted an invalid restraint upon freedom of speech was not considered by this Court, since it had not been raised in the State courts nor reserved in the notice of appeal to this Court. 374 U.S. at 433, n. 12. See, also: *Pittsburgh Press, supra,* 413 U.S. at 387, n. 10.

The advertising of prescription drug prices bears only a tenuous relationship to the public health. True, it was stipulated in the District Court that pharmacy is a profession requiring licensing after graduation from an accredited pharmacy school. App. 4. See, also: Fletcher, *op. cit. supra,* at 20-23. However, the statute in the instant case, unlike those in *Semler* and *Williamson,* does not regulate the professional conduct of pharmacists. Thus, the Court stated in *Terry* v. *California State Board of Pharmacy, supra:*

> "It is perhaps appropriate here to state carefully again exactly what is at issue in this case. The plaintiffs seek an injunction against the enforcement of these statutes only insofar as they prohibit price advertising. The plaintiffs are not asserting a right to receive information concerning the quality, effectiveness or capabilities of the drugs, information which tends more directly to promote the product. Thus, the narrow issue before this court is whether low-income consumers of prescription drugs are entitled under the First Amendment to receive information consisting of the retail price at which pharmacies sell prescription drugs."

Cf. Maryland Board of Pharmacy v. *Sav-A-Lot, Inc., supra,* 311 A. (2d) at 249.

Accordingly, it should be concluded that the flimsy nexus

of the present statute to the public health does not justify a prohibition of the advertising of drug prices, even under the Fourteenth Amendment cases.

Appellants argue, on pages 14 *et seq.* of their brief, that consumers have no First Amendment right to receive drug price information "in a *particular manner,*" that is, through advertising, since they can request, but admittedly may be denied, such information on the telephone, or they can go from store to store to secure the information. Stipulation of Facts, ¶¶25 and 28, J.A. 15.

A similar argument was rejected by this Court in *Kleindienst* v. *Mandel,* 408 U.S. 753, 765 (1972), where it was stated:

> "The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because 'technological developments', such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows in Part V—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access."

More specifically, in *Terry* v. *California State Board of Pharmacy, supra,* it was urged that the First Amendment right to know drug prices through advertising was inappli-

cable because of the existence of alternative means of securing price information as a result of the requirements that drug stores post the prices of the 100 most commonly used drugs and that druggists answer oral and written inquiries about prices. Rejecting this contention, the Court stated:

> "The availability of other alternatives certainly does not extinguish the constitutional interest of plaintiffs in the particular form of access sought. *Kleindienst* v. *Mandel,* 408 U.S. 753, 765 (1972). In other contexts, the court has indicated that the availability of alternative forums for the expression and presumably the receipt of information is wholly irrelevant to a constitutional demand for another reasonable method. *Schneider* v. *Irvington,* 308 U.S. 147, 163 (1939). . . .
>
> "Many of the plaintiffs, users of prescription drugs, are old and infirm, unable to travel to and view posted price posters at a number of pharmacies sufficiently large to provide them with an accurate sample of prices. Evidence in this case indicates that telephone contact is also very time-consuming and costly and not a feasible means of making price information available to an individual consumer. This court finds that by prohibiting media advertising, the most effective means of providing price information to consumers, the challenged statutory scheme significantly and impermissibly restricts the distribution of the information plaintiffs seek, thereby establishing a prima facie violation of the First Amendment."

Conclusion

In this First Amendment case the need for easily accessible information concerning the prices of prescription

drugs outweighs any conceivable regulatory interest in prohibiting the advertising of such prices. Accordingly, it is respectfully submitted that the decision of the District Court should be affirmed, and that the decision in *Patterson Drug Company* v. *Kingery, supra,* should be disapproved.

Respectfully submitted,

HAROLD ROSENWALD
Counsel for Osco Drug, Inc.

MOTION FILED
JUL 31 1975

IN THE

Supreme Court of the United States

October Term 1975

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, *et al.*,
Appellants,

against

VIRGINIA CITIZENS CONSUMER COUNCIL, *et al.*,
Appellees.

APPEAL FROM THE U. S. DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL RETIRED TEACHERS ASSOCIATION

MILLER, SINGER, MICHAELSON,
BRICKFIELD & RAIVES
555 Madison Avenue
New York, New York 10022
(212) 752-8830
Attorneys for *Amici Curiae*

ALFRED MILLER,
STEPHEN L. SOLOMON,
Of Counsel.

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Appellees.

APPEAL FROM THE U. S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) and the National Retired Teachers Association (NRTA), of 1909 K Street, N.W., Washington, D. C. 20006, respectfully move the Court for permission to file the attached brief *amici curiae* for the following reasons, which reasons also disclose the interest of the *amici*.

AARP is a not-for-profit membership corporation of more than 7,500,000 persons over the age of 55. NRTA is a not-for-profit membership corporation of over 450,000 retired teachers and school administrators.

Among the purposes of AARP are: to improve the quality of life for older people in this country; to understand aging and its ramifications; to offer older citizens opportunities to plan a way of life designed to attain maximum enrichment; and to help foster equality of opportunity for the aging population in this country.

Among the purposes of NRTA are: to promote the professional and economic status of retired teachers; to afford retired teachers an opportunity for the interchange of information and opinion on subjects of common interest; to aid retired teachers to receive available services and benefits; and to facilitate united action amongst those devoted to the welfare of retired teachers.

The more than eight million members of these affiliated and jointly administered organizations represent the largest organized group of older Americans in the country. As retired persons, members of AARP and NRTA are generally on relatively fixed incomes and because of their age many also depend substantially on prescription drugs for their well being. Because of the high cost of drugs, this case is especially critical to the health and welfare of AARP and NRTA members and of all older Americans.

AARP and NRTA believe that the lifting of restraints against the publication and other accessible disclosure of the prices of prescription drugs will contribute to the general lowering of the retail cost of such drugs. Unrestricted factual price disclosure will facilitate more intelligent consumer selection of pharmacies by permitting consumers to consider the worth of the various services offered by particular establishments in relation to the prices charged.

Indeed, precisely because of *amici*'s concern over the high cost of drugs for older persons, *amici* inaugurated a not-for-profit pharmacy service for their members in 1959 in the nation's capital, which presently operates pharmacies at six locations throughout the United States.[1] These establishments (known as "Retired Persons Pharmacies" or the "NRTA/AARP Pharmacy Service"), which together represent the largest non-governmental mail order dispenser of prescription drugs, maintain both a "walk-in" and mail order business.

The NRTA/AARP Pharmacy Service was established with two basic objectives—to provide prescription and non-prescrip-

[1] Washington, D. C.; St. Petersburg, Florida; Long Beach, California; East Hartford, Connecticut; Kansas City, Missouri; and Indianapolis, Indiana.

tion medications to members at reasonable cost and with convenient delivery, and to influence others to provide prescriptions at lower prices, especially for older persons, through price competition. *Amici* are particularly interested in the outcome of this case, because of the effect statutes such as Virginia's have had in limiting the success of our second objective.

WHEREFORE, Movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectively submitted,

MILLER, SINGER, MICHAELSON,
BRICKFIELD & RAIVES

By .....

Alfred Miller
A Member of the Firm
555 Madison Avenue
New York, New York 10022
(212) 752-8830
Attorneys for *Amici Curiae*

IN THE

Supreme Court of the United States

October Term 1975

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, *et al.*,
Appellant,

against

VIRGINIA CITIZENS CONSUMER COUNCIL, *et al.*,
Appellees.

BRIEF *AMICI CURIAE*

Introduction

Amici have consistently taken the position before state legislative bodies, administrative agencies, and the Federal Trade Commission, that any state or municipal statutes or regulations, and any pharmacy association codes of ethics, which prohibit or otherwise limit the disclosure of information regarding prices of prescription drugs are inimical to the public interest. Based on our members' experiences, and our own affiliates' experience in operating six walk-in and mail order pharmacies (see attached motion, p. 2), the disclosure of drug prices in an easy to understand, readily accessible manner substantially assists consumers, particularly older consumers, in the following ways:

(1) by permitting intelligent comparison shopping and selection of a pharmacy based on an evaluation of price differences and services offered;

(2) by facilitating more meaningful communication between physician and patient, and pharmacist and patient, regarding relative price and quality of drugs; and

(3) by contributing inducements for pharmacists to lower the price of prescription drugs.

The statute presently before this Court totally eliminates the possibility for such accessible disclosure of price information. Under the statute a pharmacist is guilty of "unprofessional conduct" if he

> "publishes, advertises or promotes . . . in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or . . . for any drugs which may be dispensed only by prescription." Virginia Code Ann. Section 54-524.35(3) (1974).

Thus, the challenged statute has effectively eliminated any general price disclosure except upon a specific (*personal*) request for the price of a specific drug. See Appendix, pp. 14-15 (stips. 23, 26).

The standards to be applied in measuring whether the Virginia statute passes muster under the First Amendment have been recently clarified by this Court's decision in *Bigelow* v. *Virginia*, —— U. S. ——, 43 L. W. 4734 (June 16, 1975). Thus, it is now unmistakably clear that the mere fact that words are written in a commercial context does not by that fact alone strip them of First Amendment protections. In *Bigelow* the Court ruled that the lower courts had "erred in their assumptions that advertising, as such, was entitled to no First Amendment protection. . . ." *Bigelow* v. *Virginia, supra,* at 4739.

Bigelow did not, of course, proscribe *all* regulation of advertising. "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." *Ibid.* In *Bigelow* the Court had no occasion to delineate the "precise extent" to which a state may regulate advertising that relates to activities legitimately subject to state regulation or prohibition, such as the sale of prescription drugs, *ibid,* but it did clearly caution that even where some regulation of commercial activity is permitted, the "relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." *Ibid.*

Amici submit that the task before this Court is to weigh the public's interest in obtaining easily accessible information regarding drug prices and the role of statutes such as Virginia's in blocking such accessibility, against any legitimate interests of the state in protecting the public's health and welfare which may be served by a ban on drug price advertising.[1] In approaching this task, *amici* urge the Court to consider both the fact that advertisement of drug prices barred by the statute in question may contain "factual material of clear 'public interest'," *Bigelow* v. *Virginia, supra,* at 4738, and the fact that the Virginia statute, by failing to narrowly aim at legitimate state concerns, prohibits speech far beyond that which might be reasonably necessary to protect the public health, safety and welfare. See, e.g., *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Broadrick* v. *Oklahoma,* 413 U. S. 601, 611 (1973); *Terry* v. *California State Board,* —— F. Supp. ——, (No. C-74-1091, N. D. Cal., May 12, 1975).

Amici will demonstrate below that older Americans have a critical need for information regarding the prices of prescription drugs, and therefore an interest in receiving such information deserving of First Amendment protection, see, e.g., *Lamont* v. *Postmaster General,* 381 U. S. 301, 307 (1965), and that the Virginia statute sweeps too broadly by flatly prohibiting *all* advertising of prescription drug prices.

ARGUMENT

Consumers, especially older persons, have a critical need for accessible price information on prescription drugs, and the flat prohibition against disclosure of such information deprives them of their First Amendment "right to know."

A. The High Cost of Prescription Drugs Threatens the Health of Older Americans.

The drug industry is big business in this country, and older Americans are its best customers. In 1974, $9.7 billion was

[1] "[A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow* v. *Virginia, supra,* at 4739.

spent on drugs, approximately 10% of *all* health related expenditures.[2] Over the past few years these expenditures have increased about $700,000,000 each year,[3] and so we may confidently assume that the amount spent on drugs will continue to remain at such astronomical levels and will likely continue to grow.

Persons over age 65 contribute by far the largest proportion of expenditures to this high national total. Although such persons represent only 10% of the nation's population, in 1973 they accounted for almost *one-quarter* of all drug expenditures.[4] This represented *per capita* drug expenditures on behalf of persons over 65 of $97.27 in 1973, compared to less than half the amount, $41.18, for all age groups.[5] Preliminary estimates for 1974 indicate that *per capita* drug costs for persons over age 65 have increased to $103.17, compared to $45.14 for all age groups.[6]

The reason for such a high rate of drug and other health related expenditures for older persons is obvious. As Social Security Administration researchers have observed, "[s]ince the average aged person is twice as likely to have one or more

[2] Nancy L. Worthington, "National Health Expenditures, 1929-74," Social Security Bulletin, HEW, SSA, Vol. 38, No. 2, p. 9, Table 2 (Feb. 1975). This amount includes all drugs, not just prescription drugs, and also includes "drug sundries."

[3] *Ibid.*

[4] Barbara S. Cooper and Paula A. Piro, "Age Differences in Medical Care Spending, Fiscal Year 1973," Social Security Bulletin, HEW, SSA, Vol. 37, No. 5, pp. 3, 4 (May 1974). In FY 1973, of $8.8 billion for all age groups, the over-65 group spent $2.1 billion. This proportion is consistent with the elderly's overall 28% of the nation's health care expenditures. *Ibid.* Preliminary estimates for 1974 indicate these percentages have held constant. See Marjorie Smith Mueller and Robert M. Gibson, "Age Differences in Health Care Spending, Fiscal Year 1974," Social Security Bulletin, HEW, SSA, Vol. 38, No. 6, p. 4, Table 1 (June 1975).

[5] Cooper and Piro, *supra,* at 6, Table 2.

[6] Mueller and Gibson, *supra,* at 5, Table 2.

chronic conditions and more likely to be limited in activity, he experiences more and costlier illnesses than the average person under age 65."[7] Indeed, statistics compiled by the U. S. Office of Management and Budget reveal an even greater likelihood of ill health and limited activity than Social Security Administration estimates. Thus, in 1971, 38.7% of all Americans over age 65 were limited in at least one major activity due to chronic conditions, compared to only 9.3% for all age groups, and 16.9% of the over 65 group were unable to carry on *any* major activities because of chronic conditions, compared to only 2.9% for all age groups.[8]

Given the especially great demand for drugs by persons over age 65, it is significant that almost all such expenditures are out-of-pocket for this important item of health care, and that of all categories of health care, out-of-pocket costs are rising fastest for drugs. Thus, in 1973, of the $97.27 *per capita* expended for drugs by this age group, $85.26 or almost 90% was borne from private funds, and only $12.01 from public sources.[9] Moreover, while out-of-pocket hospital costs rose only $3 per year during 1966-1973, and professional services only $1, drugs and sundries rose $27 or almost 50% in that period.[10]

These expenditures for drugs are especially burdensome to the over age 65 population in this country in light of the fact that their income is, on the average, only half of the income

[7] Cooper and Piro, *supra,* at 3.

[8] Social Indicators, 1973, Statistical Policy Division, Office of Management and Budget, p. 36, Table 1/18 (prepared for publication by the Social and Economic Statistics Administration, Dept. of Commerce).

[9] Cooper and Piro, *supra,* at 6. This is a sharp departure from the usual source of expenditures for health care generally for the aged. Of slightly more than $1,000 *per capita* spent on health care in 1973, about two-thirds was financed from public funds. *Ibid.* Of the $85 spent for "drugs and drug sundries," approximately $59 was for prescription drugs. FTC, Report from Staff Investigating Retail Prescription Drug Price Disclosures, p. 29, Jan. 28, 1975 (hereinafter, FTC Report).

[10] FTC Report, *supra,* p. 29.

of all age groups (when they live with relatives)[11] and only about one-fifth that of all age groups when they live alone.[12] It should be noted that Medicare does not cover the cost of outpatient prescription drugs, 42 U.S.C. §§ 1395k(a)(1), 1395x(s)(2)(A), and that Medicaid, which does cover prescription drugs in Virginia, is available with full coverage only for persons over age 65 who have annual incomes less than $1,900 if living alone, or $2,500 if living with a spouse, Virginia Medical Assistance Program Policy Manual, § 301.1(D)(4)(c) (January, 1975).

The above statistics are compelling in their demonstration of the burden falling on older persons with respect to their need for drugs. However, based on our experience, and on surveys conducted of our members, we do not believe any such statistics on *average* drug expenditures accurately reflect the disproportionate burden falling on significant members of chronically ill and/or low income older Americans. Thus, for example, in a survey taken of our members in 1974, it was found that virtually all of the 2,000 respondents spent at least 10% of their income on medication, with some spending as much as 40-45%. Because of differing incomes, the range in dollars ran from less than $200 per year to well over $1,000.[13]

B. Older Americans Need Readily Accessible Information Regarding Prescription Drug Prices.

Presently effective drug pricing policies under statutory schemes such as Virginia's make it exceedingly difficult, if not

[11] Social Indicators, 1973, *supra,* p. 176, Table 5/3. The median family income in 1971 was $10,285 for all families, and only $5,453 for all persons over age 65. *Ibid.*

[12] In 1970, when the median income of all over age 65 families was $5,053, the median income for persons over age 65 living alone was only $1,951. Dep't of Commerce, Social and Economic Statistics Administration, Bureau of the Census, Current Population Reports, Series P-23, No. 43 (Feb. 1973), "Some Demographic Aspects of Aging in the United States," p. 29, Table 23.

[13] 1974 High Drug Cost Survey of NRTA and AARP Members, compiled for Sen. Edward M. Kennedy, Chairman, Senate Subcommittee on Health, Sept. 24, 1974, pp. 1-2.

impossible, for older consumers to make rational decisions in the purchase of prescription drugs. What such persons need is the ability to educate themselves as to the pricing policies of pharmacies in their area or pharmacies accessible to them by mail. The court below correctly construed the First Amendment as proscribing laws which prohibit the advertisement of price information because of the education purpose thereby served.[14]

In order to demonstrate this need for education or information, we point first to the record in this case which, together with countless surveys conducted by private groups, government agencies and litigants in similar cases, establishes that prescription drug prices differ dramatically from neighborhood to neighborhood, and from store to store. Thus, for example, the record below demonstrates price ranges (i.e., the percentage difference between low and high price surveyed) for Achromycin of 80% in northern Virginia, 140% in Richmond, and 241% in the Newport News-Hampton area. Appendix, p. 14, stip. 22. An American Medical Association survey revealed price differentials in Chicago of up to 1200%. *Ibid.*

The record confirms *amici's* own surveys of prescription drug prices. For example, in 1974 AARP volunteers assisted a public interest research group in a survey of the cost of three prescription drugs (Actifed, Ornade and Aldactazide) at 28 pharmacies in the nation's capital. The results were astounding:[15]

> —Aldactazide, a drug commonly prescribed for older persons with hypertension, had the widest price gap of $3.38. The lowest price offered was $4.57, the highest $7.95, for 36 tablets.
>
> —Actifed, a decongestant and antihistamine, varied as much as $2.07. The lowest price for 24 pills was $1.43, the highest $3.50, a price range of 245%.
>
> —Ornade, another antihistamine, ranged from $2.56 to $4.95 for 20 capsules.

[14] See, e.g., *Virginia Citizens Consumer Counsel, Inc.* v. *State Board of Pharmacy,* 373 F. Supp. 683, 685, 686 (E. D. Va. 1974) and *Terry* v. *California State Board, supra.*

[15] The survey results were reported in the AARP News Bulletin, December 1974, pp. 1-2.

> —Ten stores were inconsistent in their pricing within a 24 hour period.
>
> —Fourteen stores had in-store price discrepancies of as much as $1.00 for the same prescription.

The above and similar evidence of price variations was reviewed by the Federal Trade Commission staff. As noted by the staff in its recent report to the Commission,

> "The evidence . . . clearly establishes that throughout the United States there exist significant differences in the retail prices charged for the same prescription drugs sold by different pharmacies in the same communities. Existing surveys and studies in 20 states and the District of Columbia show that a patient with a prescription to fill may be charged widely different amounts by different pharmacies within the same community. Indeed, several surveys allege that there are great price differences for the same drug between pharmacies on the same block or within short walking distances."[16]

Because drug prices do vary so greatly, the ready availability of this price information is especially important to older persons who have, as demonstrated, heavy drug expenses and limited incomes.[17] The evidence of wide variation in the selling price of prescription drugs, however, does not, as one might have thought, reveal a free market in which consumers, including older consumers, are afforded a choice as to where to fulfill their drug needs. On the contrary, because of a pattern of concealment of purchase prices, fostered by legislation such as that involved in this case, consumers are generally unable to make a knowing and intelligent selection of retailer, and thus end up with the best price for their needs only by chance, if at all.

Pre-purchase price disclosure could be accomplished in a variety of ways. Verbal disclosure on request in the pharmacy, telephone disclosure, posters, price lists in pamphlet form for

[16] FTC Report, *supra,* p. 119. See also *Id* at pp. 120-127.

[17] As an HEW task force has recognized, the need to obtain price information is "particularly important in the case of long-term maintenance drugs," i.e., those needed by older Americans. Second Interim Report and Recommendations of the Task Force on Prescription Drugs, HEW, August 30, 1968, pp. 20-21.

out of store use, and media advertisements, are prime examples.[18] However, as the FTC has indicated, it has

> "reason to believe that . . . the availability of price information for prescription drugs is inadequate to enable consumers to use price in a rational manner as a consideration in making purchase decisions." 40 Fed. Reg. 24032 (June 4, 1975).

Legislative restrictions, such as those used by Virginia, have been identified by the FTC as a primary reason for unavailability of price information. *Ibid.* FTC staff, in commenting on the fact that consumer access to prescription drug prices is "totally inadequate," observed that

> "the *major obstacle* to such access appears to be the existence of a panoply of state laws and pharmacy board regulations which prohibit or severely restrict the disclosure and advertising of prescription drug prices." FTC Report, *supra,* p. 33 (emphasis added).

Moreover, prohibitory legislation such as Virginia's has its most significant impact on older persons, because such legislation *prevents the use of those very disclosure techniques which are most essential for their needs.* Thus, the statutory classification of any publication or advertisement of a price, amount, or discount as unprofessional conduct, would seem to clearly bar the printing and distribution of price lists, and the advertising of prices in the media. *Amici* believe that unless such methods of disclosure are authorized, older consumers will be unable to obtain necessary price information since such methods are the *only* forms of price disclosure which are tailored to meet the needs and capacities of most older persons.

The older person requires modes of price disclosure which enable him or her to conveniently compare drug costs from retailer to retailer. Because of limited mobility due to physical infirmities, older consumers frequently do not have the ability to shop around, obtain information for specific drugs and make the necessary comparisons. As noted above, almost 40% of persons over age 65 are limited in activity because of chronic physical conditions. As the FTC staff has concluded,

[18] FTC Report, *supra,* p. 17.

> "[t]he elderly person, even more so than consumers in general, needs modes of disclosure which enable him or her to make price comparisons easily and conveniently. For the elderly person who has curtailed his or her activity the most convenient modes of disclosure are those which are currently least available; that is, those that can be exercised from the home. Telephonic disclosure of prices, price lists retained by the consumer, and newspaper price advertisements would appear to be those most easily and effectively utilized by senior citizens." FTC Report, *supra,* p. 31.[19]

Of these effective methods of disclosure for older persons, all but telephonic disclosure is prohibited by the Virginia statute.

The only other method of price disclosure not interfered with by the statute is face-to-face in-store disclosure, i.e., disclosure to a customer or comparison shopper who visits the store and either makes a purchase or specifically inquires as to the price.[20] Quite apart from the physical burdens noted above

[19] While telephonic disclosure is theoretically permitted, the record in this case indicates that "some pharmacies . . . refuse to quote prescription drug prices over the telephone for several reasons" including "the mistaken belief" that such disclosure is prohibited, and the *deliberate* policy decision not to disclose because of the belief that "consumers may misread prescriptions." Appendix, p. 15, stipulation 25. This experience is confirmed by *amici's* survey in the District of Columbia, discussed *supra,* in which 39% of the pharmacies telephoned refused to disclose prices over the telephone. AARP News Bulletin, December 1974, p. 2.

[20] One form of in-store disclosure that *does* have considerable merit, the posting of a placard with prices of representative drugs listed, is also barred by the Virginia statute. When such posters are uniform from store to store, list selling price for a specific quantity, are conspicuously posted and readily accessible without the aid of a pharmacist or a clerk, they are an aid to consumers. However, standing alone, even if such posting *were* permitted by the statute, it would not relieve older persons of the physical and financial burden of comparison shopping. As the FTC report indicates:

> "posters are of only limited usefulness to consumers interested in comparison shopping for prescription drugs. If price posting is the only means of disclosure permitted, consumers must go from store to store comparing prescription prices thus increasing search time costs. Such comparisons may well be impossible for the elderly, infirm, or immobile." *Id* at pp. 251-52.

which are attributable to limitations of price disclosure to on-site visits, the financial cost of such shopping is often prohibitive to older persons who lack the financial means to finance the transportation costs. Moreover, such costs add an "implicit" price to the sales price which, as a practical matter, renders the entire comparison shopping effort counter-productive and thus useless.[21]

In sum, the FTC staff found that in-store price disclosure which is the "most prevalent mode of price disclosure,"

> "is apt to be the *least satisfactory for the elderly person* who suffers from decreased mobility and is unlikely to have either the means of transportation or the stamina to go to several pharmacies to compare prices and services." FTC Report, *supra,* pp. 30-31 (emphasis added).

This conclusion parallels an earlier one of the Maryland Court of Appeals, which noted, in the course of its opinion invalidating on due process grounds a statute similar to Virginia's, that the record in that case revealed that

> "[t]he ban on advertising prescription drug prices imposes a burden on senior citizens because they are unable to conduct any investigation, such as by reading advertisements, to learn the available prices for drugs. Many of these same persons have a great need for maintenance-type drugs." *Maryland Board of Pharmacy* v. *Sav-A-Lot, Inc.*, 270 Md. 103, 311 A. 2d 242, 252 (1973).

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[21] Professor George Stigler describes this principle as follows: "If the costs of search becomes very expensive, the consumer must forego search and become satisfied with higher purchase prices." G. Stigler, *The Organization of Industry* (1968), p. 175. See also FTC Report, *supra,* p. 314, where the staff noted that since the "time and effort" costs to the consumer to obtain the relevant drug price information "exceeds the likely benefit, there is often no practical way for consumers to compare prices."

Amici believe that the only forms of price disclosure which really meet the special needs of older persons are price lists which are made available for distribution, and media advertising. Thus, price lists provide a ready reference to prices for patients who are taking a number of prescribed drugs or who may wish to know the price of a newly prescribed drug or who require maintenance drugs on a continuous basis. Price lists can be taken from a store (or mailed by mail-order pharmacies), and collected by consumers for future use in making side-by-side comparisons to other stores' prices. Price lists can also be collected and analyzed by unions, consumer organizations, and other similar groups for distribution to members and others for price comparison purposes. Media advertising serves a similar function.

Price lists and media advertising thus provide a cheap, physically undemanding method of price evaluation for older persons. Indeed, the prohibition on distribution of price information in many states has prevented the inclusion of prescription drugs on the Retired Persons Pharmacies price list distributed to members of AARP and NRTA. This, in turn, obviously has weakened the effectiveness of our affiliated mail-order pharmacies in bringing reduced drug prices to our members.

Amici wish to emphasize that they are not suggesting that price is the *only* relevant factor in a purchase decision. Certainly services provided by a particular pharmacist, such as credit, convenient location, delivery, consultation, use of patient profiles, etc., are all influential to some degree in the decision as to where to purchase one's drugs. If provided with sufficient information the consumer could judge how much these professional or merchant services are worth to him or her, or whether greater inconvenience or fewer services should be tolerated in favor of reduced prices.

Yet, in the absence of adequate price information an informed choice simply cannot be made. Statutes such as Virginia's make this judgment *for* the consumer, and this is especially detrimental to price conscious older persons, many of whom would undoubtedly value price over ancillary services. It must be

remembered that the filling of the prescription according to the directions of the physician satisfies the specific health need of the customer. While ancillary professional services may be beneficial to consumers who want them, a choice in favor of a low price will not be a sacrifice of health requirements.

Accessible methods of price disclosure would serve two additional, but related, objectives to the objective of reasoned comparison shopping. First, the greater awareness of price information would be an assist to patients' reasoned discussions with physicians concerning the possibility of prescribing lower priced *equivalent* drugs by informing both patient and doctor of the fact of price differences. A result of greater price consciousness would likely be a modification of physician prescribing habits, and an overall lowering of drug prices benefiting all consumers.

Second, *amici* believe that if price information were made accessible to the public, prices would tend to decrease *generally*, quite apart from consumers' ability to find the best *relative* price. The interference with free market conditions, which is, after all, what price disclosure restraints are all about, necessarily reduces pressures for decreased prices because consumers are not exercising their "dollar ballots" on the basis of price. Thus, the FTC has declared that it has reason to believe that "the inadequate availability of retail price information for prescription drugs prevents or hinders price competition among retail pharmacies." 40 Fed. Reg. 24032 (June 4, 1975).

Concrete evidence that availability of price information would tend to bring down price levels is the following advertisement from a local newspaper in Vermont. Obviously reacting to substantial competition provided by *amici*'s affiliated mail order pharmacies (probably a result of "word of mouth" publicity for their low prices), a Burlington, Vermont pharmacy placed the following ad:[22]

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[22] Burlington Vermont Free Press, Dec. 9, 1974.

"HERE WE GO
AGAIN

AARP* Prescription Prices are 20% to 40%
Below Conventional Pharmacy Prices
NOW for our own Vermont Senior Citizens
we will MEET THOSE LOW, LOW PRICES
No need to send out of State
No 7 to 10 day delay
Just present Proof of Purchase Sales Slip
from AARP, Name and Quantity of
Medication.
ISN'T THIS BETTER THAN THE 10%
DISCOUNT . . . ??

*American Association of Retired Persons"

Surely the general availability of price information would induce other pharmacists to reevaluate their price policies, and establish price levels which take into consideration the desires of their potential customers.

C. Less Drastic Means of Regulation Would Protect the Public Health and Welfare.

This Court has long recognized that statutes restricting or burdening First Amendment rights must be narrowly drawn, and that where less drastic means are available to serve the asserted purpose, such methods must be used. See, e.g., *Shelton* v. *Tucker, supra; Broadrick* v. *Oklahoma, supra; Terry* v. *California State Board, supra;* see also *Hiett* v. *United States*, 415 F. 2d 664, 673 (5th Cir. 1969), *cert. denied*, 397 U. S. 936 (1970). A state legislature may not use a "blunderbuss" approach when it legitimately seeks to regulate within a small sphere of unprotected activity. *Ibid.*

States like Virginia that prohibit price disclosure by advertising have generally defended such statutes on the basis of a supposed interest in protecting public health and welfare of their citizens. While any such interests may well be relevant in determining "the precise extent to which the First Amendment

permits *regulation*" of drug price advertising, since, as noted above, the sale of drugs is an activity "the State may legitimately regulate," *Bigelow* v. *Virginia, supra,* at 4739 (emphasis added), *amici* submit that any conceivable interest of the state could be furthered by a more narrowly drawn statute that does not disregard consumer interests in the zeal to protect such interests.

Thus, the statute now before this Court *prohibits the purely factual disclosure of price.*[23] So, for example, a factual advertisement or price list that discloses *only* such facts as strength, quantity, or price of a prescription drug would nonetheless be prohibited, *even if unaccompanied by promotional advertising. Amici* would probably have little quarrel with reasonable regulation of drug advertising that, for example, required uniform information such as brand name, generic name (if product available as generic), quantity and price. Nor would they quarrel with a regulation which required the maintenance of advertised prices for a reasonable period of time, so as to preclude "bait' or "loss leader" advertising. Similarly, advertising that unfairly promotes the use of a drug, extravagantly extols its virtues and safety, discloses recommended usage or encourages unnecessary consumer purchases, might be subject to legitimate and reasonable state regulation.

The statute in question is not so finely tailored, however, since it bars *all* advertising in the desire to control some.[24] The purely *factual* and *informational* advertising barred by the Virginia statute, objectively measurable and thus verifiable, stands in sharp contrast to the subjective professional advertising before this Court in cases such as *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608 (1935). In *Semler,* the proscribed conduct was advertising of "professional superiority," use of large and "glossy" displays and guarantees of professional performance. *Id* at 609. While the dentist in *Semler* contended the statute was invalid since it proscribed *truthful* advertising, i.e., he contended that he was *in fact* superior, *ibid,* this Court noted that in order to protect the public from unscrupulous claims by those who would "prey" upon a "susceptible" public, *id* at 612, the legislature was not "bound to provide for determinations of the relative proficiency of particular practitioners." *Ibid.* Accordingly, the state statute in *Semler* was sustained against a due process challenge.

As noted, the speech proscribed here is *factual,* easily verified, and thus not subjective. Accordingly, the broad sweep of prohibition is not justified. As the Maryland Court of Appeals noted,

> "[w]hen describing the quality of services, advertising may be prone to distort; when listing definite prices or discounts, it serves as *a tool to educate rather than deceive.* Thus, pharmacists may be distinguished from other 'professions' . . . in that price advertising of retail drugs casts no unfavorable reflection on the professional aspect of pharmacy by deceiving the public about the type of services available." *Maryland Board of Pharmacy* v. *Sav-A-Lot, Inc., supra,* 311 A. 2d at 248 (emphasis added).

In sum, if and to the extent *promotional* advertising is believed to be injurious to the public interest, then *such advertisement alone* should be subjected to the state regulation. Virginia, instead, has used a blunderbuss technique that prohibits all advertising in order to eliminate the objectionable.

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[23] This is the Court's first opportunity to decide whether purely *factual* advertising by a regulated profession may be prohibited in the face of a First Amendment challenge. See *Head* v. *New Mexico Board,* 374 U. S. 424, 432, n. 12 (1963); *Pittsburgh Press Co.* v. *Human Relations Commission,* 413 U. S. 376, 387, n. 10 (1973); *Bigelow* v. *Virginia, supra,* at 4739.

[24] Cf. *Weinberger* v. *Salfi,* —— U. S. ——, 43 L. W. 4985 (June 26, 1975); *Mourning* v. *Family Publications Service, Inc.,* 411 U. S. 356 (1973). In *Salfi, only because the Court found no constitutionally protected status, id* at 4992, did it permit the Congress to regulate with a broad sweep, including in its scope cases not presenting the evil the legislation sought to avoid, *id* at 4993. See also *Dandridge* v. *Williams,* 397 U. S. 471, 484 (1970).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

MILLER, SINGER, MICHAELSON,
BRICKFIELD & RAIVES
555 Madison Avenue
New York, New York 10022
(212) 752-8830
Attorneys for *Amici Curiae*

ALFRED MILLER
STEPHEN L. SOLOMON,
Of Counsel.

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New York, New York